

1 Tuesday, 14 May, 1946

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3 INTERNATIONAL MILITARY TRIBUNAL  
4 FOR THE FAR EAST  
5 Court House of the Tribunal  
6 War Ministry Building  
7 Tokyo, Japan

8 The Tribunal met, pursuant to adjournment,  
9 at 0930.

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11 Appearances:

12 For the Tribunal, same as before.

13 For the Prosecution Section, same as before.

14 For the Defense Section, same as before with  
15 the addition of: MAJOR BEN BRUCE BLAKENEY, AC, Counsel  
16 for Accused UMEZU, Yoshijiro; CAPTAIN SAMUEL J. KIEIMAN,  
17 AC, Counsel for Accused HIRANUMA, Kiichiro; CAPTAIN  
18 GEORGE A. FURNESS, AC, Counsel for Accused SHIGEMITSU,  
19 Mamoru and MUTO, Akira; and MR. GEORGE YAMAOKA, Counsel  
20 for Accused TOGO, Shigenori.

21 - - -

22 (English to Japanese and Japanese  
23 to English interpretation was made by MOTONO,  
24 Seiichi of statements from the floor, and  
25 English to Japanese interpretation was made  
by IWAMOTO, Nasahito of statements by the

1 President, Lanny Myamoto acting as Monitor.)

2 MARSHAL OF THE COURT: The International  
3 Military Tribunal for the Far East is now resumed.

4 THE PRESIDENT: The next motion on the paper  
5 is that to be moved by the American Defense counsel.  
6 It is a plea to the jurisdiction on the grounds, among  
7 others, that Members of this Tribunal are nationals of  
8 the Allied Powers.

9 I understand Captain Furness will review  
10 this motion.

11 MAJOR WARREN: If the Court please, may I,  
12 at this time, sir, --

13 THE PRESIDENT: Major Warren.

14 MAJOR WARREN: (Continuing): present the  
15 appearances of additional defense counsel?

16 May I present to the Tribunal Major Blakeney  
17 who appears on behalf of General UMEZU;

18 Mr. YAMAOKA who appears on behalf of Mr. TOGO;

19 CAPTAIN FURNESS who appears on behalf of  
20 Mr. SHIGEMITSU, and General MUTO in addition; and

21 Captain Kleiman who appears on behalf of  
22 Baron HIRANUMA.

23 CAPTAIN FURNESS: If the Tribunal please,  
24 the supplemental plea to the jurisdiction and motion  
25 to dismiss has been signed by the five American counsel,

1 who have filed appearances for individual defendants.  
2 I will argue one point; the other points shall be argued  
3 by Major Blakeney and Mr. Yamaoka.

4           We have not been able to follow the wishes of  
5 the President of this Tribunal because of the shortness  
6 of time which we have had to prepare our motions. We  
7 have, therefore, divided the work and will divide the  
8 arguments. None of us will duplicate arguments made  
9 by other counsel. We believe, by dividing this argument,  
10 that we will expedite matters rather than extend them.  
11 We, all five, wish to stress the fact that our motion  
12 is supplemental to the motion argued by Dr. KIYOSE.  
13 The American counsel who have signed this motion will  
14 argue it in support of Dr. KIYOSE'S motion. This motion  
15 is not a substitution. I make this statement because  
16 of the way chief counsel for the prosecution has  
17 attempted to characterize Dr. KIYOSE'S motion and his  
18 presentation. We think it was a valid motion and a  
19 brilliant presentation.

20           THE PRESIDENT: I think you can omit the  
21 compliments. It is quite unnecessary.

22           CAPTAIN FURNESS: Our first ground is that,  
23 the Members of this Tribunal being representatives of  
24 the nations which defeated Japan and which are the  
25 accusers in this action, a legal, fair and impartial

1 trial is denied to these accused by arraignment before  
2 this Tribunal.

3 The question is not one of physical power.  
4 Japan would have the same physical power, Germany would  
5 have the same physical power, if those nations had won  
6 the war. We know such power exists since Japan has been  
7 defeated and is being occupied by the forces of the  
8 nations which defeated her.

9 These accused are in the dock, except in the  
10 case of two individual accused who have been imprisoned  
11 for many months prior to the filing of the Indictment,  
12 imprisoned without any legal charges being filed against  
13 them.

14 The question of jurisdiction is a question of  
15 moral judgment. It is upon that basis that we shall  
16 argue. The question is, to quote an article entitled  
17 "Justice at Nuernberg" by Professor Max Radin in the  
18 April issue of "Foreign Affairs" -- but it is just as  
19 applicable to this trial. I quote --

20 THE PRESIDENT: Do you adopt his arguments?

21 CAPTAIN FURNESS: (Continuing): "May the  
22 Court, without violating a real standard of justice,"  
23 which is another way of saying a standard of right  
24 conduct, "exercise the physical powers it so clearly  
25 possesses?"



1           The basis of the jurisdiction is the Potsdam  
2 Declaration in which the Allied Powers said "stern  
3 justice shall be meted out to all war criminals." The  
4 Charter says that the Tribunal is established for a  
5 just and prompt trial, which insures a fair trial, and  
6 the President of the Tribunal, in his opening statement,  
7 said that the Tribunal would conduct their proceedings  
8 "with the utmost expedition consistent with justice to  
9 the accused." But we contend that, under the circum-  
10 stances of its appointment, the trial can neither be  
11 fair, legal, nor impartial, and that, therefore, this  
12 Tribunal does not have jurisdiction.

13           In making this argument, we wish to stress  
14 that we are impersonal; we mean no disrespect. The  
15 vice is inherent in the situation. The parties plain-  
16 tiff in this criminal action are the nations with which  
17 Japan was and still is at war, which have defeated Japan,  
18 and which have accepted her surrender. Each Member  
19 of this Tribunal was appointed by the Supreme Commander  
20 from names submitted by each one of such nations. So  
21 that all the Members, to use the words of the President,  
22 Sir William Webb, on the opening day of the arraignment,  
23 constitute "a tribunal comprised of the representatives  
24 of the Allied Powers that defeated Japan."

25           The offenses charged in this Indictment are

1 offenses against these nations: planning, initiating,  
2 and waging war against them; violations of treaties  
3 and agreements with them; murder, violations of the  
4 laws of war, and other violent crimes against their  
5 armed forces and prisoners of war and civilians belong-  
6 ing to such nations.

7           The accused are alleged to be the leaders,  
8 organizers, and instigators of conspiracies to plan  
9 such wars against the parties plaintiff and to initiate  
10 them, to wage them, and to commit such murders and  
11 violent crimes. They are accused of having occupied  
12 positions and offices in the government and armed forces  
13 of Japan; that these positions and offices made them  
14 responsible for the observance of such treaties and  
15 agreements with the parties plaintiff for the observance  
16 of the laws and customs of war; and of having recklessly  
17 disregarded such duties. They are themselves accused  
18 individually of having planned such wars against the  
19 parties plaintiff, of having initiated them, and of  
20 having waged them. They are accused individually of  
21 murder of members of the armed forces and civilians  
22 and of having individually ordered, authorized, and  
23 permitted Japan's military commanders to commit war  
24 crimes.

25           It is obvious that these nations believed that

1 these accused are guilty of these offenses and that they  
2 should be punished with "stern justice." Otherwise,  
3 those allegations in this Indictment would not have been  
4 made, and this action would never have been brought  
5 against these accused.

6 We say that the Members of this Tribunal are  
7 representatives of the nations who are parties plaintiff,  
8 nations who are the accusers. They are the representa-  
9 tives of those nations as are the prosecutors who were  
10 appointed by the same nations. We say that regardless of  
11 the known integrity of the individual Members of this  
12 Tribunal they cannot, under the circumstances of their  
13 appointment, be impartial; that under such circumstances  
14 this trial, both in the present day and in history, will  
15 never be free from substantial doubt as to its legality,  
16 fairness, and impartiality.

17 It has been and will be argued that in these  
18 trials of war criminals it is necessary that the victor  
19 try the vanquished, the accuser the accused. We say that  
20 this is not necessary, that the accused may be tried by  
21 the representatives of neutral nations free from the heat  
22 and hatred of war, and that only through trials by repre-  
23 sentatives of such nations can legal, fair and impartial  
24 verdicts be found and just sentences be imposed.

25 If it please the Court, that completes my

1 argument on the first ground. Major Blakeney will  
2 proceed on the other ground.

3 MAJOR BLAKENEY: By leave of the Tribunal, I  
4 am Major Blakeney, counsel for General UMEZU.

5 My task is to present to the Tribunal, on be-  
6 half of all the defendants represented by American coun- :  
7 sel grounds two to six, inclusive, of the supplemen-  
8 tal motion filed by American counsel. If American  
9 counsel seem to duplicate in some measure arguments  
10 already made by Japanese counsel, it is from no care-  
11 lessness in attending the Court's hope that argument  
12 would be limited. It is the result, rather, of the  
13 differing viewpoints and approaches of lawyers trained  
14 in different legal systems which compels us at times  
15 to trace, for purposes of a different line of argument,  
16 words already addressed to the Tribunal. The grounds of  
17 the motion which I am to present perhaps need not be read  
18 but may be summarized as raising the general question of  
19 war as a crime and some of the problems incidental thereto.

20 My first point is that war is not a crime.  
21 The very concept of war implies the right legally to  
22 use force. Indeed, the very existence of the entire body  
23 of international law on the subject of war is evidence of  
24 the legality of war, for only those relations which are  
25 legal require the regulatory supervision of a system of



1 procedure and principles, and the body of law on how wars  
2 shall be commenced, notified, waged, and ended is mean-  
3 ingless if law is per se illegal. This is true whether  
4 the war be one which, considered from a particular point  
5 of view or even completely objectively, is just or unjust,  
6 legal or illegal. This point is so clear that it need  
7 not be labored, and I shall confine myself to citing  
8 the words of one of the best known of modern authorities  
9 on international law. Lauterpacht, in his sixth edition  
10 of "Oppenheim's International Law," puts it thus; and,  
11 if I may, I should like to read the entire quotation and  
12 then pause for a translation of the quotation:

13 "In the absence of an international legis-  
14 lature it (war) fulfilled the function of adapting  
15 the law to changed conditions. Moreover, quite apart  
16 from thus supplying a crude substitute for a deficiency  
17 in international organization, war was recognized as a  
18 legally admissible instrument for attacking and alter-  
19 ing existing rights of states independently of the  
20 objective merits of the attempted change. As Hyde,  
21 writing in 1922, said: 'It always lies within the  
22 power of a state \* \* \* to gain political or other  
23 advantages over another, not merely by the employment of  
24 force but also by direct recourse to war.' International  
25 law did not consider as illegal a war admittedly waged



1 for such purposes. It rejected, to that extent, the  
2 distinction between just and unjust wars."

3 And this conclusion is inevitable in the  
4 absence of any authority competent to determine, objec-  
5 tively, the question of the justness or unjustness of a  
6 particular war.

7 Never in the history of civilization, then,  
8 has the planning and waging of wars been tried as a  
9 crime by a court. There is thus no precedent for the  
10 present proceeding. It will be said, "the absence of a  
11 precedent has never been a deterrent to the growth of  
12 the law." But, as it already has been observed, the  
13 establishing of a precedent which results in ex post  
14 facto definition of a crime, in the imposing of a punish-  
15 ment upon the doing of an act not punishable when it was  
16 performed, has always been abhorrent to every system of  
17 civilized law.

18 Lord Wright, the distinguished British jurist  
19 who served as Chairman of the War Crimes Commission,  
20 warns us against the dictatorship of what he calls  
21 "pseudo-legal or legalistic rules having no basis in  
22 the common conscience of mankind." But, Lord Wright  
23 has said also that "we are proud that we live under the  
24 rule of law and of the legal machinery for enforcing it,"  
25 from which we may infer that he would be the first to

1 deprecate the system of so-called law under which the  
2 courts of Nazi Germany passed judgment "according to  
3 the sound sense of the people." For this rule of law,  
4 even at the risk of our occasional submission to a  
5 pseudo-legal rule or a legalism, has been universally  
6 acknowledged to be necessary as the alternative to the  
7 far worse rule of caprice, autocracy, and absolutism.

8 THE PRESIDENT: Major Blakeney --

9 MAJOR BLAKENEY: I beg your pardon.

10 THE PRESIDENT: I suggest that you might do  
11 what Mr. Comyns Carr did yesterday: complete your  
12 address and then have it translated.

13 MAJOR BLAKENEY: I should be glad to do it,  
14 sir.

15 LANGUAGE SECTION CHIEF: Mr. President, a  
16 translated Japanese copy of Mr. Comyns Carr's address  
17 was available to us yesterday. Such a copy is not  
18 available of Major Blakeney's address.

19 THE PRESIDENT: Well, this interpreter has no  
20 difficulty in reading passage for passage. I do not see  
21 why he cannot string them all together.

22 MAJOR BLAKENEY: I shall then continue, sir.

23 The victor nations have the power, as I think  
24 we can say they have the legal right, to impose upon the  
25 vanquished what terms they wish. The chief prosecutor

1 has asked in a flight of oratory, which I cannot emulate,  
2 "Is it possible that these nations, the accusers, have not  
3 the power to punish the authors of world-wide calamity?"  
4 It is possible. International law will agree that these  
5 twenty-eight men in the dock might have been exiled by  
6 the victorious nations to some latter-day Saint Helena,  
7 they might have been imprisoned without trial, or they  
8 might have been shot out of hand. The power is there,  
9 the right existed. But, for reasons which commanded  
10 themselves to the governments involved, the decision  
11 was taken not to proceed in any of these summary fashions,  
12 but to administer to them "stern justice." To that  
13 extent, there was a voluntary, conscious and deliberate  
14 derogation from the rights in law of the victor nations;  
15 to that extent they abandoned their absolute right of  
16 punishment of the conquered nation and its subjects.

17 It would be idle to attempt to defend this  
18 Indictment by the assertion that what might have been  
19 done may be done here, for the victor nations have  
20 chosen to proceed otherwise, and this Tribunal is  
21 limited to the exercise of the jurisdiction conferred  
22 upon it. That jurisdiction is defined by the require-  
23 ment of stern justice. Since the decision has been  
24 taken to act through judicial proceedings, we are re-  
25 mitted to the rule and principles of law. We return

1 again and again to the inescapable conclusion that  
2 these defendants must be charged with crimes or offenses  
3 legally recognized as such or must not be put upon  
4 their trial; we return to the ineluctable conclusion  
5 that the charges as stated in counts 1 to 36 of the  
6 Indictment, Group One, "Crimes Against Peace," do not  
7 constitute charges of any offense known to or defined  
8 by any law.

9 Let us turn to the valiant attempt which has  
10 been made to convince the Tribunal that the quite uni-  
11 form course of modern authority, since the peace of  
12 Westphalia declaring war to be a legal exercise of  
13 sovereignty, has reversed its course. It is said that  
14 the authorities from whom I have quoted to the Tribunal  
15 were speaking of a time prior to the creation of certain  
16 treaties, international acts and covenants which have  
17 had the effect of setting up a new current. The Tri-  
18 bunal is told that the effect of these various inter-  
19 national agreements has been to outlaw war, to render  
20 the waging of war illegal, in short, to make of war  
21 a crime.

22 We are given the Hague Conventions, the  
23 Covenants of the League of Nations, the Geneva Protocol,  
24 the Pact of Paris, the Resolution of the Pan-American  
25 Conference, the cumulative effect of which,



1 we are told, is to make war a crime. That war is the  
2 ultimate crime against humanity, by humanity, in the  
3 rhetorical sense, was recognized long before the expres-  
4 sion was so used in the Geneva Protocol of 1924. But,  
5 that there has been created a new crime in the legal  
6 sense -- in the sense of which even the sternest  
7 justice will permit of imposing a penalty for it, re-  
8 mains to be proved.

9         If the Pact of Paris, say, denouncing war,  
10 has made it criminal, what punishment has then been  
11 provided for the nation offending? We look and we see  
12 none. What penalty, in fact, has been imposed by the  
13 treaty powers when violations have occurred of this  
14 treaty which is alleged to have created law? There has  
15 been none. Quite plainly, as the conduct of the nations  
16 persuades us, there has been heretofore no body of  
17 international public opinion willing to regard the  
18 waging of war as a crime. If we may believe that the  
19 veto power means what it says, we are unable to detect  
20 even in the organization of the United Nations such a  
21 public opinion. We have the most authoritative possible  
22 statement bearing on this point. Manly O. Hudson, Judge  
23 of the Permanent Court of International Justice, and  
24 one of the universally respected living authorities on  
25 international law, has said in his International



1 Tribunals, I quote: "The time is hardly ripe for the  
2 extension of international law to include judicial  
3 processes for condemning and punishing acts either of  
4 states or of individuals." The date is 1944.

5         How shall this Tribunal find that public  
6 opinion among the victorious nations does exist to  
7 adjudge that waging of war of aggression has become an  
8 international crime, when it discovers among the nations  
9 accuser, among the nations represented on the Tribunal,  
10 one which within the period covered by the Indictment  
11 herein has itself conducted armed aggression in Asia  
12 and in Europe, has been adjudicated guilty and for its  
13 guilt has been expelled from that very League of Nations  
14 upon the covenant of which the prosecution now so relies?  
15 Shall we simply say that to the victor belongs the spoils?  
16 Or, shall we, without respect for person or for nation,  
17 but in the execution of a justice falling alike on all,  
18 require the existence of a law before we punish?

19         The waging of war has not been considered an  
20 international crime, has not been considered by inter-  
21 national law to be a crime; and, however desirable a  
22 contrary state of affairs might be, it is not so today.  
23 We know, of course -- as who does not -- the prosecution's  
24 boast that they will make new law in this case. But  
25 the very nature of the attempt precludes the possibility

1 of its fulfilment. Before a Tribunal, pledged to  
2 administer justice. "according to law, without fear,  
3 favor, or affection," before a Tribunal which has  
4 stated its own task to be "the most careful ascertain-  
5 ment of the law applicable," the gentlemen of the  
6 prosecution may well find themselves exceedingly  
7 embarrassed to urge this declaration of an ex post  
8 facto crime. I certainly do not propose to waste  
9 this Tribunal's time by argument whether an ex post  
10 facto declaration of a crime accords with law, or  
11 with justice. It is submitted that the prosecution's  
12 boast shall not be the Tribunal's judgment, that  
13 the portions of the Indictment founded on the alleged  
14 "Crimes Against Peace" should be dismissed by the  
15 Tribunal as beyond its jurisdiction to entertain.

16 I pass to my next point, which is the allied  
17 point that war is the act of a nation, not of individ-  
18 uals. It is hardly necessary to do more than state the  
19 proposition. Then entire body of international law as-  
20 sumed that war is the act of and brings into being re-  
21 lationships between states; no treaty, no convention  
22 touching on the subject of war, refers to individuals.  
23 International law by definition is applicable among na-  
24 tions and excludes individuals from its operation. if  
25 war were a crime, (as we have just seen) it could be so

1 only by virtue of treaties making it so. Yet, those  
2 treaties bind only those bodies politic, the nations  
3 by whom they were entered into, and not men of flesh  
4 and blood. Of the various treaties, agreements, and  
5 conventions, which are now relied upon to define this  
6 new crime, none declare that the premier, the foreign  
7 minister, the chief of the general staff, of the  
8 guilty nation shall forfeit his liberty or his life.  
9 Such a declaration might have been made, as a polit-  
10 ical decision, for reasons of state; but it exceeds  
11 the jurisdiction of this Tribunal, charged with  
12 dispensing justice under its announced intention of  
13 proceeding according to law, to create such a new  
14 crime.  
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G 1           The bald proposition indeed, is that, as  
o 2           a matter of law, individuals may not be charged with  
l 3           responsibility for wars, not at all because of high  
d 4           position in the state but because existing law does  
b 5           not prohibit it and assess a penalty. For this reason,  
e 6           additionally, the Indictment, insofar as it relates to  
r 7           the new crime of waging war by individuals, should not  
g 8           be tried by the Tribunal. It is superfluous to add  
& 9           that all charges of conspiring to do what was not it-  
y 10          self criminal must likewise fall.  
e 11

11           As my next point, I wish to discuss quite  
12          briefly -- because the Tribunal has already heard some  
13          argument addressed to this point -- the proposition that  
14          killing in war is not murder. That killing in war is  
15          not murder follows from the fact that war is legal.  
16          This legalized killing -- justifiable homicide, tech-  
17          nically, perhaps -- however repulsive, however abhorrent,  
18          has never been thought of as imposing criminal responsi-  
19          bility.

20           No academician, no writer of texts, not  
21          Grotius nor the League Covenant, no court administering  
22          municipal or public law, has ever breathed such a  
23          suggestion. Nor has it ever been asked whether such  
24          killings occur in a just or unjust war, in a legal or  
25          an illegal war, a war of defense or a war of aggression.



1 Men have been convicted, and have died, within recent mem-  
2 ory, for responsibility for killing in war in violation of  
3 the laws and customs which have grown up to regulate the  
4 contest of war. But the trial and punishment of those  
5 men was no judicial novelty. Rather, it was in strict  
6 conformity to age-old principles of international juris-  
7 prudence and in accordance with long recognized and freq-  
8 uently codified rules and principles of procedure.

9 If the killing of Amiral Kidd by the bombing  
10 of Pearl Harbor is murder, we know the name of the very  
11 man who hands loosed the atomic bomb on Hiroshima, we  
12 know the chief of staff who planned that act, we know  
13 the chief of the responsible state. Is murder on their  
14 consciences? We may well doubt it. We may well doubt  
15 it, and not because the event of armed conflict has  
16 declared their cause just and their enemies unjust, but  
17 because the act is not murder. Show us the charge, pro-  
18 duce the proof of the killing contrary to the laws and  
19 customs of war, name the man whose hand dealt the blow,  
20 produce the responsible superior who planned, ordered,  
21 permitted or acquiesced in this act, and you have  
22 brought a criminal to the bar of justice. But let  
23 us forego this attempt also, by the so-called "Murder"  
24 counts of the Indictment, to impose responsibility for  
25 acts upon men innocent of any specific connection there-



1 with.

2 My last point is that violations of the laws  
3 and customs of war are punishable thereunder. If I  
4 touch but briefly upon this point, it is from no doubt  
5 as to its validity but, rather, that I hope to avoid  
6 such involvement with collateral issues as might cause  
7 this great, basic, fundamental question to be obscured  
8 or lost sight of. It is in large measure self-evident  
9 that for violations of the laws and customs of war, which  
10 are specifically charged in certain counts of the  
11 Indictment, and which, unlike the so-called "crimes"  
12 which have heretofore been under discussion, do charge  
13 specifically-defined offenses under existing law -- it  
14 is, I say, self-evident that there is a forum appoint-  
15 ed for the trial of these offenses. That forum is not  
16 here. Under the laws and customs of war offenders are  
17 subject to trial by military commissions of the bellig-  
18 erent offended against. The military commission in  
19 question is patently one to be designated and appoint-  
20 ed by that belligerent. That rule is stated, for ex-  
21 ample, in the United States Field Manual for the Guidance  
22 of its armies, Field Manual No. 27-10, Rules of Land  
23 Warfare, Paragraph 356 of which is as follows:

24 "Right of Trial. No individual should be  
25 punished for an offense against the laws of war unless

1 pursuant to a sentence imposed after trial and con-  
2 viction by a military court or commission or some other  
3 tribunal of competent jurisdiction designated by the  
4 belligerent." That this Tribunal is not the military  
5 commission contemplated by the laws and customs of war  
6 is, I think, quite clear.

7 This Tribunal is sui generis. Whether it is  
8 military, as its title implies, or civil, as the  
9 character of the members and the judicial robes suggest,  
10 we are not concerned to decide. Whatever its char-  
11 acter, it is not that military commission. It is  
12 not the commission in the sense in which that term is  
13 familiar to international law. And it is, therefore,  
14 not the tribunal for the trial of the offenses now in  
15 question.

16 And now, Mr. President, I am done, with one  
17 last word: The Chief Prosecutor assumes to speak for  
18 America in urging upon this Tribunal the acceptance of  
19 this Indictment as drawn. Those of us American defense  
20 counsel who wear the uniform of the armed forces of  
21 our country, I think, also have the right to speak  
22 for America. We speak for American, for Anglo-Saxon,  
23 for Anglo-American, for democratic views of justice,  
24 of fair play. We speak for the proposition that  
25 observing legal forms, while ignoring the essence of

1 legal principles, is the supreme atrocity against the  
2 law. It is to the commission of this atrocity that  
3 the invitation is extended by the Indictment herein.  
4 The responsibility before history of this Tribunal,  
5 and of us who play our several parts here, is tremen-  
6 dous; it is awe-inspiring. That responsibility goes  
7 far beyond the fate of these twenty-eight men here on  
8 trial. If, from this trial, the better world which  
9 we all hope for, a more perfect system of law, are to  
10 emerge, the proceeding must so be conducted that no  
11 man shall be able to say that justice has been outraged.  
12 By a trial founded upon such a dubious jurisdiction as  
13 this, we may, indeed, prove anew the power of the  
14 victor over the vanquished; but we cannot hope to add  
15 luster to our repute for attachment to justice and law.

16  
17 LANGUAGE ARBITER (Major Moore): I rise to  
18 call the Tribunal's attention to a problem that, sir,  
19 will hound us to the end of this trial. It is the  
20 problem of interpretation and translation. Do you  
21 want that to be put into Japanese?

22 THE PRESIDENT: I do not know that you have  
23 any right -- you might point out in a casual way to me  
24 and my colleagues that some difficulties have arisen.  
25 I would like to know now, in brief terms, from the  
interpreter, whether he can interpret what was said by

1 Major Blakeney.

2 LANGUAGE ARBITER (Major Moore): May I  
3 answer for the interpreters, sir?

4 THE PRESIDENT: You may.

5 LANGUAGE ARBITER (Major Moore): He can give  
6 you, sir, a running translation concerning which the  
7 speaker may call attention time and time again to the  
8 inaccuracies because of the inherent difficulties in  
9 the Japanese language which speaks in an opposite way  
10 from the English.

11 THE PRESIDENT: Well, I cannot understand  
12 yet why he can interpret paragraph for paragraph, large  
13 paragraph for large paragraph, and yet not be able to  
14 string those paragraphs together.

15 LANGUAGE ARBITER (Major Moore): If I may be  
16 allowed to say just one more word, sir, it is simply  
17 that if speakers who have prepared speeches will  
18 prepare a translation, as the speaker did yesterday,  
19 time of this Court will be saved and later arguments  
20 in regard to interpretation will be removed.

21 MR. KEENAN: Might I make a suggestion to  
22 this Court? We were just handed a copy of three motions  
23 yesterday, and we spent all day in court yesterday. It  
24 is utterly impossible to prepare a written reply and  
25 have the difficult translation into the Japanese



1 language completed in time for distribution with the  
2 motions being heard the next morning.

3 THE PRESIDENT: We will recess for fifteen  
4 minutes.

5 (Whereupon, at 1030, a recess was  
6 taken until 1045, after which the proceedings  
7 were resumed as follows:)

8 MARSHAL OF THE COURT: The Tribunal is now  
9 resumed.

10 THE PRESIDENT: The interpreter will proceed  
11 with the translation of Major Blakeney's address.

12 LANGUAGE SECTION CHIEF: Mr. President, during  
13 the recess Captain Coleman informed me that Japanese  
14 counsel request a complete and accurate translation  
15 verbatim of Major Blakeney's remarks.

16 THE PRESIDENT: What does that mean?

17 LANGUAGE SECTION CHIEF: Without the use of a  
18 full and complete translation staff, neither of which  
19 is available to the Tribunal or to the defense, it would  
20 require a several-day job. With a full translation  
21 staff it could be done in a couple of hours. That is,  
22 the written translation could be made and then read in  
23 court.

24 THE PRESIDENT: What is to prevent that  
25 interpreter from reading as he read before?



1           LANGUAGE SECTION CHIEF: What he read before,  
2 sir, was a summarization of ideas. It contained a  
3 certain amount of inaccuracies. We had intended to  
4 proceed with that course. Japanese counsel, as I said,  
5 has requested a complete and accurate and verbatim  
6 translation of Major Blakeney's remarks.

7           THE PRESIDENT: He has been translating some  
8 passages, some large and some small. Now he is faced  
9 with a translation of a very large passage, put it  
10 that way. It covers every page, but he should be able  
11 to do it.

12           LANGUAGE SECTION CHIEF: He can, sir, in a  
13 summarization way, but he cannot do it verbatim.

14           THE PRESIDENT: We had better proceed to do  
15 it in that way. We may be able to meet the wishes of  
16 the defense later.

17           LANGUAGE SECTION CHIEF: All right, sir. As  
18 you say, sir. We shall proceed, sir.

19           Mr. President, one more matter. Major  
20 Blakeney has just informed me that there were places  
21 where he did not continue on the regular written  
22 script where it will be necessary to get the remarks  
23 from the court reporter.

24           THE PRESIDENT: This translation, of course,  
25 is not required to be sure there will be no miscarriage

1 of justice likely. The whole purpose of this translation  
2 into the Japanese language is to carry out the Charter  
3 which, I think, is public information.

4 The defendants concerned cannot be smarting  
5 under any injustice in the circumstances. Their own  
6 counsel made the speech. I think, under the circumstances,  
7 we should be satisfied if later on the full address  
8 delivered by Major Blakeney is given to the defense, and  
9 that we should now proceed to hear the reply to the  
10 motion unless there is some other counsel on behalf of  
11 the defense.

12 MAJOR BLAKENEY: There are other counsel, if  
13 the Tribunal please, to follow. But, as I understand,  
14 you wish them to follow after the translation.

15 THE PRESIDENT: Well, it appears that any  
16 translation that will be given now will not be satis-  
17 factory. So, we had better proceed with the further  
18 addresses in support of the motion.

19 MAJOR BLAKENEY: Very well, sir. Then Mr.  
20 Yamaoka will address the Court.

21 LANGUAGE SECTION CHIEF: Mr. President, may I  
22 request the same steps be taken with Mr. Yamaoka's  
23 remarks as with Major Blakeney's -- namely, that a  
24 translation be given later to the defense?

25 THE PRESIDENT: Yes. Apparently, translation

1 paragraph by paragraph is not satisfactory.

2           LANGUAGE SECTION CHIEF: It is not verbatim;  
3 no, sir.

4           THE PRESIDENT: The change that we brought  
5 about this morning has not given rise to the difficulty  
6 at all. It was there all the time, and now we have  
7 become aware of it.

8           MR. YAMAOKA: May it please the Tribunal,  
9 I do not know that it can be done in the manner suggested,  
10 Mr. President, for the reason that although I did have  
11 some written argument -- because Major Blakeney,  
12 Dr. KIYOSE, and the others have covered several aspects  
13 of my argument, I have been obliged to change, and more  
14 or less I will be compelled to discuss matters extempor-  
15 aneously.

16           LANGUAGE SECTION CHIEF: Of course, sir, in  
17 that case we can get it from the court transcript.

18           THE PRESIDENT: Go ahead. Proceed, sir.

19           MR. YAMAOKA: Is it my understanding, Mr.  
20 President, that I am to continue throughout, or shall  
21 I pause as we have in the past?

22           THE PRESIDENT: I think you had better go  
23 straight ahead and not wait for any part of your ad-  
24 dress to be interpreted.  
25

MR. YAMAOKA: Thank you, sir.

1 THE PRESIDENT: Are you speaking extempor-  
2 aneously or from notes?

3 MR. YAMAOKA: More or less from notes.

4 May it please the Tribunal, we are here con-  
5 cerned, as has been repeatedly stated, with the trial of  
6 major war criminals in the Far East as set forth in the  
7 Potsdam Declaration. The reading of the Indictment also  
8 discloses that, in the main, it proposes to charge these  
9 individual defendants as war criminals for the commission  
10 of war crimes as therein alleged. It seems, therefore,  
11 that the very use of these terms in these instruments  
12 of "war criminals" and "war crimes" presupposes as an  
13 absolute condition the existence of a state of war as  
14 known to international law. If the acts alleged as war  
15 crimes in the Indictment occurred during times of peace  
16 between Japan and the countries involved, since no war  
17 existed, there could be no war crimes in the legal  
18 sense. It is very clear also from the above instruments  
19 that war crimes and war criminals are employed in the  
20 legal as distinguished from the lay sense.  
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1           Now, it is quite well settled that a state  
2 of belligerency is one of technical meaning. Each  
3 power in the exercise of its sovereign rights has the  
4 privilege of declaring a state of belligerency; or, if  
5 they do not declare it, in any event, the act of  
6 belligerency, that is, the status of belligerency, is  
7 usually recognized even without the declaration imposing  
8 certain obligations on neutrals as well as the belligerents.

9           International law also imposes certain obliga-  
10 tions on belligerents that must be observed during the  
11 state of belligerency. Now, having these points in  
12 mind, let us review the various counts of the Indictment.

13           It is noted that in many of these charges these  
14 defendants are alleged to have committed war crimes  
15 during the period January 1, 1928 through September 2,  
16 1945. It is a matter of judicial as well as common  
17 knowledge that the state of belligerency as between  
18 Japan and the United States, including the Philippines,  
19 the British Commonwealth of Nations as defined in count  
20 4 of the Indictment, and the Kingdom of the Netherlands  
21 commenced in December, 1941. The acts charged in the  
22 Indictment and the counts thereof prior to said dates,  
23 therefore, cannot possibly be claimed to be war crimes  
24 in the legal sense.

25           As to China, Japan was also at peace with

1 the properly constituted government of that country  
2 during the entire period of the Indictment, according  
3 to her contention; and, according to her contention,  
4 no state of belligerency ever existed between them.  
5 On the other hand, if this proposition is disputed on  
6 the grounds that the lawful government of China was  
7 and is the regime of Generalissimo Chiang Kai-shek,  
8 then, even admitting such proposition solely for the  
9 purpose of argument, it must be admitted that even this  
10 government did not declare war against Japan until  
11 December 9, 1941. This also is a matter of public  
12 record of which this Tribunal must take judicial notice.  
13 The counts of the Indictment, therefore, that allege  
14 as war crimes acts of commission or omission perpetrated  
15 during the period January 1, 1928 to December 9, 1941,  
16 are not, in fact or in law under any construction, war  
17 crimes since they occurred during times of peace.

18 Similarly, the Union of Soviet Socialist  
19 Republics came into a state of belligerency with Japan  
20 on August 9, 1945. Of this fact this Tribunal must  
21 take judicial notice. The counts of the Indictment  
22 that allege as war crimes acts prior to that, therefore,  
23 do not constitute in a legal sense war crimes even  
24 though they might be labeled such.

25 With respect to the Republic of France,

1 Japan was not during the period mentioned in the  
2 Indictment, that is, from January 1 through to  
3 September 2, 1945, at war with the lawfully constituted  
4 government of the said Republic. It probably will be  
5 contended that the Free French movement headed by  
6 General Charles de Gaulle, which unilaterally presumed  
7 to declare a state of war between Japan and France in  
8 December, 1941, created a state of belligerency.  
9 However, it is to be remembered that for a long time  
10 after December, 1941 the principal powers maintained  
11 diplomatic relations with the Vichy Government and  
12 recognized that regime as the lawful successor to the  
13 Third Republic. General de Gaulle and his party prob-  
14 ably first obtained legal status or recognition by the  
15 French people subsequent to his entry with the American  
16 forces into Paris in August, 1944. His provisional  
17 government was thereafter established and recognized  
18 as the ad interim government of France, I believe, in  
19 October, 1944. Consequently, under any construction,  
20 a state of belligerency could not possibly have existed  
21 until his regime was lawfully installed and recognized  
22 as such by the world powers. It follows, therefore,  
23 that the charges in the Indictment and the counts  
24 alleging as war crimes acts committed prior to this  
25 date are not technically war crimes.

1           With respect to French-Indo-China, the  
2 Japanese forces occupied that country pursuant to  
3 agreements reached between Japan and the lawful  
4 government of France and the Governor-General of  
5 French-Indo-China, who, I believe, was at that time  
6 the lawful authority and lawful representative of  
7 the government of France.

8           Now, turning to the Mongolian People's  
9 Government, the war crimes alleged against the defend-  
10 ants are contained in counts 1, 5, 26, 36, 44 and 51  
11 of the Indictment. It is not clear from this Indict-  
12 ment whether this Republic is to be deemed sui generis  
13 or is to be deemed a part of the Union of Soviet  
14 Socialist Republics. It is not deemed that at any  
15 time during the period covered by this Indictment a  
16 state of war or belligerency, as recognized by  
17 international law, ever existed between Japan and the  
18 said Republic; but, if this Republic is deemed to be  
19 a part of the Union of Soviet Socialist Republics,  
20 then a state of war could not possibly have existed  
21 until August 9, 1945, the date when the declared  
22 state of belligerency existed. Moreover, it is sub-  
23 mitted that this Republic has never been a party to  
24 the treaties, articles and assurances referred to in  
25 count 17 of the Indictment. Its exact legal status,



1 moreover, that is, as a sovereign entity, we believe,  
2 is also open to question. There seems to be several  
3 differences of opinion. Count 17 and the parts referred  
4 to in the Appendices involve charges of war crimes  
5 against the Union of Soviet Socialist Republics, but  
6 whether such charges can be levelled by the Mongolian  
7 People's Republic is a question which is open to some  
8 doubt. However, if by the manner in which the relation-  
9 ship of this Republic to the Union of Soviet Socialist  
10 Republics is alleged by construction, we admit that  
it is a part of the Union of Soviet Socialist Republics,  
then the counts in respect of the Mongolian People's  
3 Republic should be dismissed because of surplusage and  
4 redundancy, the charges against the Soviet Union being  
legally sufficient for all purposes.

16 For similar reasons war crimes alleged in  
17 counts 1, 4, 5, 16, 24, 34, 37, 38 and 44 of the  
18 Indictment against the Kingdom of Thailand have no  
19 validity in law or in fact, we submit, since no state  
20 of war at any time existed between said country and  
21 Japan.

22 Further, counts 1, 4, 5, 44, 53, 54 and 55  
23 of the Indictment, in so far as they attempt to charge  
24 offenses against the Republic of Portugal, have no  
25 validity since these two countries were never at war

1 during the times mentioned in the Indictment.

2 Likewise, counts 1, 4, 5, 13, 21, 30, 37,  
3 38, 43, 44, 53, 54 and 55, in so far as they attempt  
4 to charge offenses against the Commonwealth of the  
5 Philippines, being that the said Commonwealth is a  
6 part of the United States, should be stricken from  
7 the Indictment.

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1           If any war existed between the said Common-  
2 wealth and Japan, it arose subsequent to December 8,  
3 1941; and, by reason of the state of belligerency  
4 existing between Japan and the United States, and the  
5 charges brought by the United States, we believe that  
6 the charges brought by the Commonwealth of the  
7 Philippines are included in the charges of the  
8 United States.

9           For similar reasons, the charges in the  
10 Indictment alleging crimes against India should be  
11 stricken, since it is a part of the British Empire,  
12 having no independent sovereign autonomy as dis-  
13 tinguished from the mother country, and the charges  
14 by the British Commonwealth of Nations as defined in  
15 count 4 include India.

16           Consequently, the Indictment and the various  
17 counts charging acts of commission or omission prior  
18 to the aforesaid critical dates, or against countries  
19 with whom no state of war legally existed, cannot,  
20 within the purview of the Potsdam Declaration and the  
21 Surrender Instrument, as well as under international  
22 law, be deemed war crimes.

23           This Tribunal consequently has no authority,  
24 notwithstanding the provisions to the contrary con-  
25 tained in the Charter, to entertain such charges

1 since to do so, as previously pointed out, would violate  
2 the rule against expost facto laws. It cannot now be  
3 contended by the various states here involved, as a  
4 matter of their own convenience, to reject their own  
5 declarations of belligerency or status of non-bellig-  
6 erency and now assert as war crimes acts which neither  
7 in fact nor in law can be treated as war crimes, since  
8 they were committed during time of peace. Because of  
9 these reasons, the charges in the Indictment and the  
10 counts in the Indictment should be dismissed.

11 Turning to another point raised by the  
12 defense, it is to be borne in mind that during the  
13 period January 1, 1928 up to and including the commence-  
14 ment of hostilities between Japan and the countries  
15 involved, and in the instances of those countries  
16 where no state of war was actually declared or existed,  
17 friendly diplomatic relations were maintained. During  
18 this entire period of peace the acts now charged as war  
19 crimes were the subject of protests and discussions  
20 and negotiations between the parties. Under inter-  
21 national law, as well as some of the treaties, the  
22 aggrieved parties could have availed themselves of the  
23 modes of redress in accordance with international  
24 usage to settle such disputes. If the settlement of  
25 such disputes had been unsatisfactory the aggrieved



1 parties had the right, and did so in many instances  
2 to resort to measures short of war or even go to war  
3 as a matter of right. This they did not do. Rather,  
4 they continued diplomatic relations. Therefore, in a  
5 sense, they were accessories after the fact, and  
6 they cannot now be heard to state that that which they  
7 condoned can now belatedly be punished today. Such  
8 acts, it is submitted, under any legal construction  
9 constitute a waiver or a bar or estoppel, or contain  
10 the element of estoppel.

11         Turning specifically to paragraphs fifteen  
12 and sixteen of the present motion, several counts of  
13 the Indictment charge these defendants with being war  
14 criminals, in having committed breaches of the pro-  
15 visions of the Covenant of the League of Nations prior  
16 to the commencement of the present war. In addition  
17 to the fact that such violations cannot be considered  
18 war crimes, it is submitted that such violations were  
19 the subject of remedies by the League. As we all  
20 know, soon after the outbreak of the Manchurian  
21 Incident in 1931, the Lytton Commission was appointed.  
22 It undertook a thorough investigation of the incident  
23 and published its findings. That is a matter of  
24 record. In other words, the League and its members  
25 did not consider this incident as amounting to a legal

1 state of war. Moreover, although under Article 16 of  
2 the Covenant the members could and should have imposed  
3 the economic and military sanctions, they chose not to  
4 do so. Under such circumstances it is difficult to  
5 understand the contention now made that such acts  
6 are war crimes, and that these individual defendants  
7 are punishable for such violations that were subject to  
8 prior treaties. It should also be noted that the  
9 Indictment charges the commission of war crimes because  
10 of the violations of the League Covenant, and the  
11 claim is made that such violations constitute  
12 violation in respect to parties who were strangers to  
13 that Covenant. I believe it is well settled that  
14 strangers to treaties can derive no benefits there-  
15 under. The counts of the Indictment containing such  
16 changes should therefore be dismissed.

17 Coming now to the conspiracy counts of the  
18 Indictment, as well as those charging the planning  
19 and preparation, as well as those alleging the  
20 initiation of a war of aggression, and a war in  
21 violation of international law, treaties, agreements,  
22 and assurances by these defendants, they charge, in  
23 substance, various elements of the same ultimate crime,  
24 that is, the waging of a war of aggression, as set  
25 forth in the counts.

1           It is submitted that under most systems of  
2 jurisprudence, the consummation of the greater of-  
3 fenses merges the lesser crimes. Under Anglo-  
4 American laws, specifically, this rule, in the absence  
5 of statute providing to the contrary, is followed.  
6 Conspiracies under common law are deemed to be mis-  
7 demeanors. The charges here brought against these  
8 defendants are nothing less than felonies, as has al-  
9 ready been stated by the Chief Prosecutor; and, since  
10 there is no international law, custom or usage which  
11 makes such conspiracies a felony, the consummation of  
12 the felony must necessarily merge the lesser crimes.  
13 For these reasons, these conspiracy counts should be  
14 dismissed.

15           Finally, I desire to make an additional  
16 statement. We are here in a court of law to administer  
17 justice in accordance with the law. The crimes here  
18 charged, no matter how much they have outraged human  
19 morality, have not and still are not sanctioned as  
20 legal crimes of justiciable nature. This is not to  
21 say that they should not be punished. They probably  
22 should be, but the sad fact is that until such acts  
23 become so recognized by the law of nations, and custom  
24 and usage, we cannot treat them as legal crimes.

25           Aside from the reasons contesting the

1 jurisdiction of this Tribunal and the grounds of  
2 dismissal of the Indictment that have been argued, if  
3 the Indictment is not dismissed in its present form,  
4 I venture to state that we will be setting precedents  
5 which would be very upsetting to the order of world  
6 relationship. If we permit this Indictment to stand,  
7 it would mean that the events of the past, events  
8 subject to specific treaties, events of history,  
9 under the guise of legalism, which we submit in itself  
10 violates itself, would be open to question. The door  
11 would be opened and precedent established which, even  
12 in the foreseeable future, might subject even the  
13 victor nations to similar charges and revoke and  
14 nullify acts already settled, and which are part of  
15 settled history. It is suggested, with great respect,  
16 that the Tribunal should not follow such a course.

17 THE PRESIDENT: Is there any other member  
18 of defense counsel to address us?

19 MAJOR BLAKENEY: That, Mr. President, con-  
20 cludes, I believe, our presentation this morning.

21 THE PRESIDENT: Mr. Chief Prosecutor.

22 MR. KEENAN: In my momentary absence I did  
23 not hear the Court's ruling on the method of procedure  
24 in the presentation of these oral arguments. I had  
25 expected that the procedure outlined would be



1 followed and that the translations would be made into  
2 the Japanese language. I am informed that there has  
3 been some alteration in that procedure, and I there-  
4 fore ask the Court, if now the defense counsel are to  
5 be heard, to conclude their statements and arguments  
6 without translation, but the prosecution will be  
7 required to wait in the interim, paragraph by para-  
8 graph until it is --

9 THE PRESIDENT: That is not the intention.  
10 We were told, Mr. Chief Prosecutor, that the whole of  
11 the translation of this morning -- the whole of the  
12 translations of the defense, of Major Blakeney's  
13 address, was unsatisfactory, even where the trans-  
14 lation was made paragraph by paragraph, because the  
15 translator did not have the address in sufficient time  
16 to prepare a satisfactory translation. The change-  
17 over that I suggested to Major Blakeney merely prevents  
18 that, so we will hear you now without any interruption  
19 from translators, if you so desire.

20 MR. KEENAN: The Court will, of course,  
21 understand the utter physical impossibility of com-  
22 pleting an argument that is being prepared to a motion  
23 a few hours before you appear in court.

24 THE PRESIDENT: We realize that, Mr. Chief  
25 Prosecutor, but I understand these counsel came in

1 late. However, we will take an adjournment, if you  
2 like. Would you like to do that?

3 MR. KEENAN: No, I am ready to proceed.

4 THE PRESIDENT: Very well.

5 MR. KEENAN: I wish, if the Tribunal please,  
6 to discuss the first point raised in this motion and,  
7 as a preliminary thereto, to make it abundantly clear  
8 that the prosecution neither boasts nor asserts its  
9 intention to have any new law made. We would rather  
10 it be made abundantly clear that our position is that,  
11 in this Indictment and in this proceeding, we are ask-  
12 ing this Tribunal to enforce what we believe to be a  
13 valid, existing and just precept of law.

14 The first point raised in this motion has  
15 to do with the ability of the successful Allied Nations  
16 to have constituted a court, legal, fair and impartial,  
17 and the proposition is adduced and asserted that such  
18 could never be, that is to contend that, in the event  
19 of this present war, all of the nations of the world  
20 other than the Axis powers themselves, felt them-  
21 selves attacked and their institutions of government  
22 and their way of life challenged, as it was, so that  
23 there was a question whether or not they could remain  
24 longer in existence, they having allied and joined  
25 forces to repress and end the aggression. Let us

1     assume, for the purpose of clearly understanding this  
2     argument, that all of the Allies, all of the other  
3     nations excepting the Axis Powers, had so united and  
4     that the war was brought to a close. Indeed, in a  
5     very large sense, such event was in the process at  
6     the moment the war came to an end.

7             The proposition of accused then would be --  
8     and we say with great respect -- that it would be  
9     necessary perhaps to wait until our scientists could  
10    perfect a safe rocket ship to go up to Mars, to  
11    another planet, and there find some neutral nations  
12    or peoples to come and sit upon judgment of those  
13    responsible for aggressive war. That is the reasoning  
14    of the proposition that is solemnly presented to this  
15    International Tribunal. There is no escape therefrom,  
16    and in plain English and Japanese we are told that  
17    these Allied Nations cannot in any way contribute  
18    towards the composition or formation of a tribunal.  
19    But, I assume, since there seems to be some faint,  
20    implied suggestion that there might be some power in  
21    some way to try some of these individuals who could  
22    in some way be proved guilty of something, that we  
23    might turn this whole business over to a tribunal  
24    composed of the representatives, perhaps of the  
25    Argentine Republic, Spain, perhaps Sweden, and we

1 might add Erin.

2           When I addressed this Honorable Tribunal  
3 yesterday, I made the statement, and I stated at the  
4 beginning, "Can it be that eleven nations represented  
5 on this Tribunal and in this prosecution, and in them-  
6 selves representatives of orderly governments of  
7 countries containing one-half to two-thirds of the  
8 inhabitants of this earth, having suffered through  
9 this aggression the loss of a vast amount of their  
10 resources and deplorable and incalculable quantities  
11 of blood due to the crimes of murder, brigandage and  
12 plunder, are now totally impotent to bring to trial  
13 and punish those responsible for this world-wide  
14 calamity?" My language was challenged. But today,  
15 we find accused counsel coming into Court and making  
16 precisely that contention: that no such power resides  
17 within any tribunal composed of this great numbers  
18 of people of the earth.

19           Mr. President, far be it from me or my in-  
20 tention to in any manner or fashion attempt to inflame  
21 anyone to any unjust result, no more so than I would  
22 have the temerity of thought in reference to a tribunal  
23 of these distinguished jurists and statesmen who have  
24 come from far-off corners of the earth for this solemn  
25 procedure. The language that was used was descriptive,



1 but I contend with great respect that it was even an  
2 understatement, for our opponents in Court today make  
3 light of the subject matter of war. They treat it as  
4 something abstract, something that has a legitimate  
5 purpose in the world, a rather sacred purpose enshrined  
6 in a certain manner by tradition, and by legal pre-  
7 cepts and, as far as I can determine, by justice.  
8 And, for the first time in an open forum, we have the  
9 assertion made that there is no difference between an  
10 aggressive and a defensive war. That is enough.

11 It is the contention of the prosecution that  
12 one matter is and has been outlawed and that is aggres-  
13 sive warfare. Aggressive warfare can mean nothing  
14 else but warfare that is not defensive, and it will  
15 take, I hope, more than Mr. Oppenheim or Mr. Hyde or  
16 some others to establish the principle that it is im-  
17 possible in this day and age to employ just and  
18 reasonable preventive measures to the purpose of  
19 eliminating for all time aggressive warfare. We may  
20 as well face realities. We have asked for it in the  
21 prosecution end, and we shall at no time avoid it.

22 Of course, there is a dearth of precedent;  
23 that we all recognize. But, that an offense has been  
24 committed and has not been punished has never consti-  
25 tuted sound, legal or moral reasoning for denying the

1 existence of the offense itself. That, of course, is  
2 our main contention in this case. That there will  
3 always have to be question of justice of a proceeding  
4 where power and force have been brought into motion,  
5 we admit today and with no apology that the Allies  
6 are in control of Japan. We admit that great force  
7 and violence, including the Hiroshima bomb, have been  
8 employed by the Allies, and we make no more apology  
9 for that than does a decent, innocent citizen walking  
10 home from his office, his factory or shop to his home  
11 and his family employ the use of force to prevent his  
12 life being taken by an outlaw.

13         The challenge as to the fairness of this  
14 Tribunal, it seems to me, is a misconception in this  
15 regard. It is of small moment or import who the mem-  
16 bers of this Court are or who the members of the pros-  
17 ecuting staff are or who the members of the defense  
18 counsel panel are, or even, if the Court please, whom  
19 the defendants happen to be. Eleven neutral nations  
20 could send to Japan eleven jurists to preside over  
21 this hearing who have no interest and whose nations  
22 had no part in bringing about an end of this carnage,  
23 but that would not be the test of the fairness of the  
24 trial. The test of the fairness and of the impartial-  
25 ity will be made manifest in an open court where every

1 proceeding is subject to the scrutiny of the press  
2 and the observers and the Japanese people and the  
3 visitors and the wide, wide world; and the answer to  
4 the fairness is, will this Court require ample evidence  
5 of the guilt of these accused? Will the Court permit  
6 an adequate opportunity for defense of these accused?  
7 Will the propositions of law, as matters of justice,  
8 be sustained in the pages of history? Those are the  
9 tests, not superficial ones as to whether or not the  
10 Members of this Tribunal happen to be named, as they  
11 all were, each and every one of them, by their in-  
12 dividual nations and designated by the Supreme Command-  
13 er as Members of this Tribunal thereafter. And I sub-  
14 mit, with great respect to this Court, and with  
15 appreciation of the difficulties of defense counsel,  
16 that their objections to the fairness of this Court or  
17 the fact that it could not be fair is premature.  
18 History will answer that at the end of this proceed-  
19 ing. And, if there is any question as to the fairness  
20 of the prosecution, that, too, will be determined in  
21 the course of this trial.

22           It is, therefore, the position of prosecu-  
23 tion and the Allied prosecutors that in constituting  
24 a court of this nature, unknown to Axis Powers or any  
25 of them during the period of the Axis existence, in

1 this very courtroom will be made manifest to the  
2 Japanese people themselves the elements of a fair  
3 trial which, we dare say, perhaps they may not have  
4 enjoyed in the fullness -- in all of their past his-  
5 tory.

6 Now as to the legal propositions concerning  
7 the ex post facto objection and the paragraphs two to  
8 seven, I have asked the cooperation of my learned col-  
9 league, Mr. Justice Mansfield from Australia, and ask  
10 permission for him to address the Court on these  
11 points.

12 Before I terminate, may I ask the Court re-  
13 spectfully to give consideration to striking from the  
14 record any reference to the expulsion from the League  
15 of Nations of any power unnamed as being totally ir-  
16 relevant and without the issues of this case. I have  
17 submitted for consideration to this Court that it might  
18 take it up at an appropriate time for decision.

19 THE PRESIDENT: Yes.

20 MR. JUSTICE MANSFIELD: If the Tribunal  
21 please, I propose to devote my argument entirely to  
22 matters of law which have been raised by the motion  
23 before the Tribunal. I propose to answer the argu-  
24 ments which have been put forward on points two, three,  
25 four, five and six. Before doing so, I would point



1 out that in paragraph two of the motion it is set out  
2 that the Indictment in count 1 to 36 charges as an  
3 offense the planning and initiating and waging of  
4 war. The Indictment does not do that. The Indict-  
5 ment charges the planning, initiating and waging of  
6 a declared or undeclared war or wars of aggression so  
7 that I would point out that is what the Tribunal will  
8 have to consider.

9 The next matter which I desire to put to the  
10 Court is the fact that the quotation from Oppenheim  
11 edited by Lauterpacht, which was silent when read in  
12 its true context, bears an entirely new meaning to that  
13 which that particular passage would bear when it is so  
14 divorced from its context. The particular passage is  
15 found on page 145 of the Sixth Edition, and I would ask  
16 the indulgence of the Court to be allowed to read the  
17 context in which that passage appears. It says:

18 "Prior to the General Treaty for Renuncia-  
19 tion of War the institution of war fulfilled in Inter-  
20 national Law two contradictory functions. In the ab-  
21 sence of an international organ for enforcing the law,  
22 war was a means of self-help for giving effect to  
23 claims based or alleged to be based on International  
24 Law. Such was the legal and moral authority of this  
25 notion of war as an arm of the law that in most cases

1 in which war was in fact resorted to in order to in-  
2 crease the power and possessions of a State at the  
3 expense of others, it was described by the States in  
4 question as undertaken for the defense of a legal  
5 right. This conception of war was intimately connect-  
6 ed with the distinction, which was established in the  
7 formative period of International Law and which never  
8 became entirely extinct, between just and unjust wars.  
9 At the same time, however, that distinction was clearly  
10 rejected in the conception of war as a legally recog-  
11 nised instrument for challenging and changing rights  
12 based on existing International Law. In the absence  
13 of an international legislature, it fulfilled the  
14 function of adapting the law to changed conditions.  
15 Moreover, quite apart from thus supplying a crude  
16 substitute for a deficiency in international organi-  
17 sation, war was recognised as a legally admissible  
18 instrument for attacking and altering existing rights  
19 of States independently of the objective merits of the  
20 attempted change."

21 And then appears the passage which was  
22 quoted by the defense counsel.

23 I would refer, in addition, to the statement  
24 of the law by Oppenheim as he views it at present, and  
25 the Court will see that it is entirely opposed to the

1 view which has been asserted by the defense. On page  
2 161, the writer deals with the effect of the Paris  
3 Pact, and he says, I quote: "The Pact constitutes a  
4 radical change in International Law and a removal of  
5 the principal objection to its recognition as a system  
6 of law. Prior to the Pact the main defect of Inter-  
7 national Law as a body of law consisted not so much in  
8 the absence of an international legislature or exec-  
9 utive as in the admissibility of war as a regular  
10 legal institution. The Pact of Paris altered that  
11 state of the law. War cannot now legally, as it could  
12 be prior to the conclusion of the Pact, be resorted to  
13 either as a legal remedy or as an instrument for  
14 changing the law. Resort to war is no longer a dis-  
15 cretionary prerogative right of States signatories of  
16 the Pact; it is a matter of legitimate concern for  
17 other signatories whose legal rights are violated by  
18 recourse to war in breach of the Pact; it is an act for  
19 which a justification must be sought in one of the ex-  
20 ceptions permitted by the Pact of Paris." The position  
21 then--

22 THE PRESIDENT: Mr. Justice Mansfield, your  
23 argument will take some time?

24 MR. JUSTICE MANSFIELD: No, I will be brief.  
25 Those quotations will probably be the greater part of

1 my argument. I have to finish in about eight minutes.

2           The further contention which was made was  
3 that there was no declaration in the conventions or in  
4 international law that a breach of international law is  
5 a criminal act. I would point out that in no inter-  
6 national convention is there a declaration that any act  
7 is criminal. There is no declaration in any inter-  
8 national convention declaring individuals to be re-  
9 sponsible for breaches. There is no statement in any  
10 convention of the penalties to be imposed in the event  
11 of a breach of a convention, so that the mere fact that  
12 in the Pact of Paris or in any other convention there  
13 is no declaration that it is criminal, there is no  
14 declaration of the individual responsibility or of the  
15 punishment, does not in any way prove or demonstrate  
16 that that absence is a fatal defect as far as the case  
17 for the prosecution here is concerned. Thousands of  
18 cases have been tried and thousands of war criminals  
19 have been sentenced and executed; and I would refer to  
20 the paragraph on page 12 in an article by Lord Wright  
21 with regard to the position as he sees it. He says:

22           "The Pact, which is clear and specific, con-  
23 verts the moral rule into a positive rule comparable to  
24 the laws and customs of war, and like these laws and  
25 customs binding on individuals since the principle



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23 verts the moral rule into a positive rule comparable to  
24 the laws and customs of war, and like these laws and  
25 customs binding on individuals since the principle

1 that individuals may be penally liable for particular  
2 breaches of International Law is now generally accept-  
3 ed. Thus violation of the principle that war, if un-  
4 just, is illegal and is not only a breach of treaty  
5 on the part of the nation which violates it, carrying  
6 with it all the consequences which attend a treaty-  
7 breaking, but is also a crime on the part of the indi-  
8 viduals who are guilty as conspirators, principals or  
9 accessories of actively bringing it about, as much as  
10 a violation of the customary laws of war. Nations can  
11 only act by responsible instruments, that is by per-  
12 sons. If a nation, in breach of a treaty, initiates  
13 aggressive war the guilt of the responsible agents of  
14 the nation who bring this about, being able to do so  
15 by reason of their high position in the State, is a  
16 separate, independent and different liability, both in  
17 its nature and penal consequences."

18           And then he, at another portion on the same  
19 page says, "An International Court, faced with the duty  
20 of deciding if the bringing of aggressive war is an  
21 international crime, is, I think, entitled and bound  
22 to hold that it is, for the reasons which I have  
23 briefly and imperfectly here sought to advance."

24           Now the next matter to which I desire to  
25 refer is the number 5 in the motion, that is, with

1 regard to the charge of "Murder," and I will put this  
2 very briefly. It is an accepted principle, I submit,  
3 that all killing is unlawful unless it is justified.  
4 If aggressive war is an international crime, then any  
5 killing committed in the course of aggressive war can-  
6 not be justified as an act which international law  
7 recognizes. No justification, I submit, can flow from  
8 the commission of an international crime. Similarly,  
9 if the war is waged in violation of treaties and that  
10 is a crime, then similarly no justification can flow  
11 from that particular crime. Therefore, any killing  
12 which is committed in the course of the waging of an  
13 international crime, in the commission of an inter-  
14 national crime, namely the waging of a war or wars of  
15 aggression, which I submit the Court will find is an  
16 international crime, or a war in violation of treaties  
17 which, I also submit the Court will find is an inter-  
18 national crime, can be justified by reason of the fact  
19 that it was committed during that war.

20           The next point is number 6 with regard to  
21 the appointment of military commissions and the refer-  
22 ence which was made to the United States Military  
23 Manual. In the punishment of war criminals, many  
24 methods have in the past been tried. Tamlin took the  
25 sultan around the cities in a cage, and Napoleon was

1       exiled to St. Helena. Society has progressed and a  
2       trial conducted with fairness, justice and impartiality  
3       is now the method which is employed. A military com-  
4       mission is recognized as one of the methods by which  
5       war criminals may be brought to justice, and the per-  
6       sonnel of the military commission is, I submit, en-  
7       tirely irrelevant. A commission or a court which is  
8       appointed by the military commander, whether it can be  
9       called a military commission or whatever it may be  
10      called, is the appropriate tribunal to try offenses  
11      against the laws of war and offenses against inter-  
12      national law generally, so that I submit that it is  
13      not the constitution of the court but the source from  
14      which that court derives its authority, as far as be-  
15      coming a court is concerned, that should really be  
16      considered.

17               I, therefore, submit that the fact that this  
18      Court is not composed of military members completely  
19      and is not appointed from the members of one of the  
20      belligerent armies is entirely irrelevant, and I,  
21      therefore, submit that the Court will dismiss the  
22      motions as far as paragraphs two, three, four, five  
23      and six are concerned.

24               DR. KIYOSE: We quite agree that the address  
25      should be translated later; but, if the pleas, or what



1 is submitted by one side or the other, and the de-  
2 cision made by the President is not interpreted, we  
3 do not know what is going on, and we should like to  
4 have the interpretations of those points. I would  
5 also call your attention to Article 9b of the Charter  
6 where it is said that "the trial and related proceed-  
7 ings shall be conducted in English and in the language  
8 of the accused."

9 THE PRESIDENT: The trial will be conducted  
10 in English and in the language of the accused and has  
11 been conducted in English and the language of the ac-  
12 cused. Part of the translation has been postponed to  
13 insure that a satisfactory explanation shall be forth-  
14 coming.

15 The Court will now recess until thirty  
16 minutes after two.

17 (Whereupon, at 1215, an adjournment  
18 was taken until 1430, after which the proceed-  
19 ings were resumed as follows:)  
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AFTERNOON SESSION

The Tribunal met, pursuant to recess, at 1430.

(English to Japanese and Japanese to English interpretation was made by SHIMANOUCHI, Toshiro of statements from the floor, and English to Japanese interpretation was made by MORI, Tomio of statements by the President, Akira, Itami acting as Monitor.)

MARSHAL OF THE COURT: The International Military Tribunal for the Far East is now resumed.

MR. COMYNS CARR: May it please the Tribunal, it is now my duty to reply to the observations of Mr. Yamaoka on Paragraph 7 and onwards of the motion which is now before the Tribunal. I propose to deal with those matters generally, and Judge Hsiang, the chief prosecutor for China, the Republic of China, desires to follow me with a few observations on that paragraph which is Number 9 and other paragraphs which deal specifically with his country.

To a large extent, the matters raised are the same, in principle at least, as those raised in points 2 and 3 of the motion which were discussed yesterday, and I do not propose to repeat myself on those topics more, at all events, than I can help in dealing with the

1 present argument.

2 Before I come to the paragraphs in detail I  
3 should like to take up two general points with which  
4 Mr. Yamaoka concluded his argument. He protested  
5 against this Tribunal setting precedents in internation-  
6 al law and I should like to make one or two observations  
7 as to the extent to which, in our submission, it would  
8 be proper for this Tribunal to do so.

9 In the course of my remarks yesterday, I  
10 quoted two passages from Stowell's International Law  
11 in which he lays down the proposition that it was in  
12 1919 in the power and the right of victorious nations  
13 to define the offense after it had been committed, and  
14 to prosecute the Kaiser or anybody else for that offense,  
15 and I should like to make it clear how far I am adopting  
16 those particular observations as part of my argument.  
17 Without expressing a view one way or the other as to  
18 the correctness of those particular observations of his  
19 in their full extent, it is not necessary and we do not  
20 desire, for the purposes of this trial, to go the full  
21 way with them.

22 We are not asking this Tribunal to make any  
23 new law, nor are we admitting that the Charter purports  
24 to create any new offense, but this much I submit may  
25 properly be said: International law, like the legal

1 system of certainly I think all of the English-speaking  
2 countries -- I should not like to lay down any proposi-  
3 tion with regard to other systems -- consists of a common  
4 law and a more specific law, which in the case of indi-  
5 vidual countries is created by statute, and in the case  
6 of international law is created by treaties. But the  
7 foundation of international law, just like the foundation  
8 of the legal systems of at least the English-speaking  
9 countries, is common law. That is to say it is the  
10 gradual creation of custom, and of the application by  
11 judicial minds of old established principles to new  
12 circumstances, and in that sense in our submission it is  
13 unquestionably -- and without invoking the larger  
14 principles -- it is unquestionably within the power, and,  
15 in my humble submission, the duty of this Tribunal to  
16 apply well-established principles to new circumstances  
17 if they are found to have arisen without regard to the  
18 question whether precise precedent for such application  
19 already exists in every case.

20 I cited yesterday the precedent established  
21 by Article 227 of the Treaty of Versailles laying down  
22 the principle, and applying what, in my submission,  
23 was already a well-established principle to new circum-  
24 stances. That precedent has made the application of  
25 the same principle to similar circumstances in this



1 case something which is no longer a novelty at all as  
2 it was in 1919.

3 But I would respectfully submit to the  
4 Tribunal that whereas we -- well, on the one hand we  
5 are not asking them to make, or claiming that the  
6 Charter has made anything which could properly be  
7 described as ex post facto law, we do say that, in  
8 accordance with the well-known principles of the growth  
9 of common law, whether it be national or international,  
10 there is no reason to shrink from the application of  
11 well-established principles to the circumstances which  
12 have now arisen, even if such application might -- we  
13 do not think it is, but it might -- in any particular  
14 circumstance appear to be novel.

15 Now, the other general observation -- oh, and  
16 I would just add on that point a comment on another  
17 remark which fell from Mr. Yamaoka -- he said that for  
18 this Tribunal to set precedents would mean that the  
19 victor nations were imposing their will -- something  
20 to this effect -- upon the defeated today in the shape  
21 of law, and that a time might come when one of them  
22 might regret -- have occasion to regret that that  
23 precedent had been established.

24 Now, that is exactly what has happened to  
25 these defendants in the dock. They were one of the

1 victor nations in 1919. They took part, we say rightly  
2 took part as I pointed out yesterday, in applying those  
3 principles to Germany and to the Kaiser after the defeat  
4 of Germany. It may be unfortunate for these defendants  
5 that they did so. But the fact remains that with the  
6 turn of the wheel of fortune, and following upon their  
7 own lamentable adoption of the methods which Germany  
8 adopted in 1914, and again in 1939, that fate which  
9 Mr. Yamaoka spoke of in reference to the future has  
10 fallen upon them in reference to the past.

11 Now, the other subject which he touched upon  
12 was the question of conspiracy. I want to say a few  
13 words about that in connection with the whole of these  
14 paragraphs of this motion and not only in connection  
15 with the limited application of his particular argument  
16 this morning.

17 In every legal system that I have ever heard  
18 of, when once it is established that a particular thing  
19 is a crime, it follows automatically that a conspiracy  
20 to do that thing is also a crime, and the essence and  
21 nature of conspiracy is that the offense is complete  
22 when the agreement to commit the offense is arrived at,  
23 entirely irrespective of the question whether the crime  
24 is in fact ultimately committed and the conspiracy is  
25 in fact ultimately brought into effect or not.

1           Now, that elementary legal principle appears,  
2 in my submission, to be completely overlooked in the  
3 whole of this argument insofar as it is addressed, as  
4 it is addressed, to the counts of conspiracy in this  
5 Indictment. It is entirely irrelevant from that point  
6 of view whether in relation to any of the counts referred  
7 to in the various paragraphs of this motion that there  
8 actually ever was a state of war between Japan and  
9 that country or not. The conspiracy to wage illegal  
10 warfare against that country once established is a crime  
11 in itself, whether war actually supervened or whether  
12 it did not.

13           Now, the particular point in relation to  
14 conspiracy mentioned by Mr. Yamaoka, and to which I  
15 can find no reference whatever in the motion, is the  
16 highly technical doctrine that when a conspiracy is  
17 actually accomplished and the crime is committed, the  
18 offense of conspiracy merges in the actual crime, and  
19 that he describes as a principle of Anglo-American law.  
20 It certainly is no principle of English law. I would  
21 hesitate to express any view as to whether it is a  
22 principle of American law.

23           The two offenses of conspiracy and the actual  
24 commission of the crime to which the conspiracy is  
25 directed are quite separate in our practice, at all

1 events always separately charged, and separate convictions,  
2 tions, if both counts are proved, may be recorded in  
3 respect of each of them, although no doubt in the matter  
4 of punishment it is customary, although no obligatory,  
5 for the punishment to be the same for both, or at all  
6 events not to be cumulative.

7           However that may be, once it is realized that  
8 the offense of conspiracy is established, whether the  
9 crime is actually carried out or not, the whole of these  
10 objections, so far as they are directed against the  
11 conspiracy counts, and so far as they are based upon  
12 matters of time and date and upon the proposition that,  
13 technically, an actual state of war between the countries  
14 concerned never supervened, falls to the ground.

15           If, on the other hand, an actual state of  
16 illegal war did supervene and that offense is made out,  
17 it is of very little practical moment to us on which  
18 of the two counts relating to the particular matter this  
19 Tribunal should decide to convict these defendants;  
20 although in our submission the two sets of counts can  
21 perfectly well stand side by side and no doctrine of  
22 merger applies.

23           Paragraph 7 raises the point that the Tri-  
24 bunal's jurisdiction to try and punish war criminals  
25 being founded upon Japan's capitulation in accordance



1 in so far as they attempt to charge offenses committed  
2 prior to those dates, respectively, state no crime or  
3 offense "justiciable" by this Tribunal.

4 Now, I have already dealt with that in so far  
5 as it includes in its attempted condemnation the  
6 conspiracy counts.

7 I should now like to say a word or two about  
8 counts for planning and preparing. Planning and pre-  
9 paring, when committed as it is charged here in every  
10 case to be committed, by a number of persons, is in its  
11 essence the same thing as conspiracy. And if -- which  
12 is not the case -- it was sought to apply it to one in-  
13 dividual alone in any particular count, it would still  
14 be, in principle, subject to the same arguments which  
15 I have already put forward with regard to conspiracy.

16 Planning and preparing either is an offense  
17 or it is not. But the very essence and nature of it is  
18 that it must be something which took place or which be-  
19 gan, at all events, before the actual state of war  
20 arose, and, in my submission, being governed by exactly  
21 the same principles as conspiracy. In fact to allege  
22 as an objection to it that it took place before the  
23 actual state of war arose is merely to put forth a  
24 contradiction in terms -- of course it is!

25 I should say, then, as I understand, this

1 paragraph is intended also to include an objection to  
2 certain counts relating to countries with regard to  
3 which it is alleged that there never was a legal state  
4 of war and to crimes committed at those times and  
5 under those circumstances.

6 Now, in my submission -- and what I am going  
7 to say now will make it unnecessary for me to deal with  
8 the same principle again in a number of the following  
9 paragraphs of the motion -- it is a legal absurdity  
10 to submit that a nation or group of individuals re-  
11 sponsible for the policy of a nation can carry out war-  
12 like acts and then seek to absolve itself or themselves  
13 from the consequences by saying, "Oh, well, we omitted  
14 to take the steps which would technically convert the  
15 state of affairs into a state of war. We are absolved  
16 from all responsibility."

17 What are they if there was no state of war at  
18 all? They are even more obviously, then, in the position  
19 in which we submit they are when there was a state of  
20 war but an unlawful state of war. That is to say, they  
21 are persons who are ordering the armed forces of their  
22 country to go out and commit murder. They cannot have  
23 it both ways. Either there was a war, in which case if  
24 it was a lawful war, the killing of opponents in battle  
25 is admittedly a lawful thing. If it was an unlawful war,

1 we say that the killing of opponents in battle in that  
2 unlawful was was an unlawful thing and that, therefore,  
3 they fail in showing that there was a justification  
4 for the intentional killing of those people, which alone  
5 could prevent that killing from being murder. But if  
6 there was no war at all, as is now being suggested, then  
7 in our submission there is no possible justification  
8 for the killing of those people. And if this argument  
9 is right, the killing of every single individual, soldier  
10 or civilian, who was killed in the course of that fight-  
11 ing is murder, without any possible ground of defense  
12 whatever.

13 It appears to us, therefore, in our submission,  
14 that this argument of the defense, this highly technical  
15 argument, lands them in an even worse position, if it  
16 be accepted, than the position they were in before.

17 Murder is a crime which is triable by the  
18 law and in the court of every country. The Charter  
19 provides that crimes against humanity, including murder,  
20 are to be triable by this Tribunal, whether those crimes  
21 were crimes under the domestic law of the country where  
22 committed or not. That is to say, this Tribunal is given  
23 jurisdiction to try crimes which might otherwise be  
24 tried in the domestic tribunals of the countries where  
25 those crimes were committed. And, in the domestic

1 tribunals of every one of those countries, murder is  
2 understood in the same way and is one of the most serious  
3 offenses triable by the law of that country. You, if  
4 I may respectfully so submit, are merely substituted by  
5 this Charter for the courts of the numerous countries  
6 concerned and given, in that respect, the jurisdiction  
7 which those courts might otherwise have exercised.

8           Now, as to whether the argument is well founded:  
9 that because there was no declaration, therefore there  
10 was no war, for the reasons I have explained we are not  
11 very much concerned to debate. But, in my submission,  
12 if you will look at the Hague Conventions, particularly  
13 No. 4, you will see that they distinguish between war and  
14 hostilities in this sense, that at the opening of Hague  
15 Convention No. 4, the Annex to it, which constitutes the  
16 rules, is a section dealing with "Of Belligerents; The  
17 Status of Belligerent," and it describes the persons  
18 who are entitled to claim that status. It says:

19           "The laws, rights, and duties of war apply  
20 not only to the army, but also to militia and  
21 volunteer corps fulfilling all the following conditions:  
22 They must be commanded by a person responsible for his  
23 subordinates; they must have a fixed distinctive sign  
24 recognizable at a distance; they must carry arms openly;  
25 and they must conduct their operations in accordance with



1 the laws and customs of war."

2 Then, if you will turn to Convention No. 3,  
3 dealing with the opening of hostilities and the declar-  
4 ation of war, the exact phrasing is this:

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1 Article 1: The contracting powers recognize  
2 that hostilities between them must not commence without  
3 a previous and explicit warning in the form of either a  
4 declaration of war, giving reasons, or an ultimatum with  
5 a conditional declaration of war. Those who drew up  
6 these Conventions clearly recognized that "hostilities"  
7 was a term covering war, both lawful and unlawful, and  
8 that belligerent rights could only be acquired by those  
9 engaged in a war which was lawful and which, among  
10 other things, was lawful or was not unlawful by reason  
11 of the failure to give the due notice required by  
12 Convention number three.

13 Our submission, therefore, is that all the  
14 provisions of Convention number four, including the  
15 prohibition of certain means of injuring the enemy in the  
16 Section 2 of it, which is entitled "Of Hostilities,"  
17 including the provisions relating to prisoners of war,  
18 and including the provisions relating to the duty or  
19 duties of an army of occupation. All those are equally  
20 applicable. In my submission, whether there is, in the  
21 technical sense of the word, a properly constituted war  
22 or merely a state of hostilities which does not amount  
23 to a properly constituted war.

24 However, as I have already pointed out, if  
25

1 the defendants are right in their contention that there  
2 was not a properly constituted war as between Japan and  
3 the various countries dealt with in the ensuing para-  
4 graphs in my submission, their charts are in an even  
5 more disastrous position than they would have been if  
6 there had been such a war.

7 Paragraph 9 of the motion then goes on to  
8 deal with the allegation that there was no war between  
9 the Republic of China and the lawfully constituted  
10 Government of Japan until the 9th of December 1941.  
11 I said something about that particular point yesterday.  
12 Judge Hsiang will say a little something more about  
13 that this afternoon. I have nothing now.

14 It goes on to make a similar allegation with  
15 regard to France. So as far as that purports to cover  
16 the conspiracy counts I have dealt with it, and so far as  
17 it applies to the count with regard to actual hosti-  
18 lities in French-Indo-China. I have in effect also  
19 dealt with it, because the arguments which have just  
20 been put before the Tribunal apply to France as well as  
21 to every one of the other countries concerned.

22 Then it proceeds, in paragraph 11, to put  
23 forward a similar argument with regard to Thailand, which  
24 I also dealt with yesterday and which is also covered  
25 by the arguments I have put forward today. And, in

1 paragraph 12 there is a similar argument with regard  
2 to Portugal which I mentioned yesterday, although I  
3 pointed out that if the principle enunciated in paragraphs  
4 2 and 3 of yesterday's motion were sound, they would  
5 equally apply to Portugal, and my pleas which I have  
6 just made equally apply to Portugal. They do not raise  
7 here the point which I dealt with yesterday, and there  
8 was a further reason why Thailand and Portugal should not  
9 be mentioned in the Indictment and why these defendants  
10 should not be charged with crimes committed against those  
11 countries and their citizens: because they were not  
12 amongst the nations who were at war with Japan at the  
13 time when the terms of surrender were signed, nor were  
14 they parties to it.

15 I would draw the attention of the Tribunal  
16 to the Treaty Articles, the breach of which we referred  
17 to in our Appendix "B" of the Indictment in paragraphs 37  
18 and 38, namely, the "Convention respecting the Rights and  
19 Duties of Neutral Powers and Persons in War on Land,"  
20 signed at the Hague, 18 October, 1907. That is one of  
21 the group of Conventions which dealt as comprehensively  
22 as possible at that date with the whole relation of  
23 peace and war between the nations of the world. Article  
24 I of that particular Treaty, which is very short, says,  
25 "The territory of neutral Powers is inviolable." Article



1 II says, "Belligerents are forbidden to move troops  
2 or convoys, whether of munitions of war or of supplies,  
3 across the territory of a neutral Power." And these  
4 defendants, so far as they instigated and ordered  
5 Japanese troops to attack the territories of nations  
6 with whom they say they were not at war, were guilty of  
7 a gross violation of those provisions of that one of  
8 the Hague Convention.

9 Then in paragraph 13, the motion asked you  
10 to strike out certain counts in so far as they referred  
11 to offenses committed against the Mongolian People's  
12 Republic. The precise status of that government is one  
13 which would have to be the subject of evidence, and I  
14 think the Tribunal has already indicated that it will be  
15 open to the defendants on evidence to raise again points  
16 relating to those matters which require evidence in  
17 order to enable them to found their argument.

18 I can just indicate quite shortly to the  
19 Tribunal now what the evidence will show when it is  
20 given as to the position of that country. It was, at  
21 the relevant date -- or claimed to be -- an independent  
22 Republic, the independence of which was recognized by  
23 some countries, including the Union of Soviet Socialist  
24 Republics, but not by others, particularly China. Its  
25 territory, in view of the Chinese Government of that

1 date was never claimed to be a part of the Union of  
2 Soviet Socialist Republics; but it was an alliance  
3 with that Government at the date of the attack which  
4 is referred to in the **Indictment**; and there were, in  
5 anticipation of that attack, troops of the USSR pre-  
6 pared to defend it; and the attack made by the Japanese  
7 was an attack upon the territory of that Republic,  
8 but in part upon troops of the USSR which were within  
9 reach. That is why, in the particular count concerned,  
10 both the Mongolian People's Republic and the Union of  
11 Soviet Socialist Republics are mentioned. As far as  
12 the argument is based upon the proposition that Japan  
13 was not at war with that Republic -- as far as that  
14 is concerned -- it is subject to the same general  
15 principles which I have already given.

16           Then paragraph 14 again takes up the point  
17 that Japan was at peace with the nations mentioned in  
18 the counts referred to -- in that count of the Indict-  
19 ment referred to in that paragraph -- and says that,  
20 since other nations did not treat such acts as crimes  
21 but continued uninterrupted diplomatic relations with  
22 Japan, which continuance of diplomatic relations sub-  
23 sequent to such acts constituted a condonation waiver  
24 or bar, they cannot now be treated as crimes, whether of  
25 nations or of individuals, and the state counts no crime or

1 offense "justiciable" by this Tribunal.

2 Now, that is a matter of which the facts  
3 would have to be proved before this Tribunal could  
4 deal with them, and the facts vary very much in rela-  
5 tion to the various countries concerned. I would  
6 only make this submission on the general legal  
7 proposition if the facts were established in any  
8 particular case in the way alleged here.

9 In my submission, the fact that a country  
10 is not, or an individual is not, at the time in a  
11 position to punish a crime is no bar to the punish-  
12 ment of that crime when it is afterwards either dis-  
13 covered or the offender is apprehended and the  
14 machinery of justice is in a position to work. In-  
15 deed, in no criminal system that I am aware of would  
16 the Court representing in a criminal case the justice  
17 of the state, and in an international criminal case  
18 the justice of the world, admit any plea of private  
19 condonation or settlement as between the criminal  
20 and his victim to be entered as a defense at all.  
21 If the victim has by extortion, by violence and fear  
22 been compelled to submit to the crime without tak-  
23 ing immediate steps to bring the criminal to justice,  
24 that is a matter which no court would allow the crim-  
25 inal to plead in bar. But, even if the victim has



1 voluntarily accepted compensation, or agreed to condone  
2 the offense, that is a matter which not only would not  
3 be allowed to be pleaded in bar on the prosecution of  
4 the offender but might involve the victim in penalties  
5 on his own act for an attempt to stifle the ends of  
6 justice. In my submission, no such matter, even if  
7 established on the facts, could possibly be allowed to  
8 be pleaded as a defense in a criminal prosecution before  
9 this or any other tribunal.

10 Paragraphs 15 and 16 raise what is in prin-  
11 ciple the same point with regard to the Covenant of the  
12 League of Nations, and it says that certain penalties  
13 might have been exacted under the Covenant against Japan  
14 that were not at the time exacted, and that is a reason  
15 why this Tribunal should not try these defendants for  
16 criminal offenses committed now that they are brought  
17 before this Tribunal.

18 In addition to the reasons I have submitted  
19 why no condonation by the Government of the victim could  
20 be an answer or bar to these proceedings, there is the  
21 further objection that the penalties mentioned in the  
22 Covenant of the League of Nations are of totally dif-  
23 ferent character and affect a totally different body,  
24 namely, the Government of Japan and not the individuals  
25 whom we see in this dock.



1           Number 17 raises an entirely different con-  
2     stitutional point with regard to the position of the  
3     Commonwealth of the Philippines, and it says that you  
4     cannot try a crime against the Commonwealth of the  
5     Philippines because it is a part of the United States  
6     of America, and therefore the allegations with regard  
7     to the Commonwealth of the Philippines are surplusage  
8     and should be struck from the Indictment. There again,  
9     that is a matter of fact, although I am surprised to  
10    see the allegation put forward by the American counsel.

11           I am informed that when the facts come to be  
12    proved, they will show that the Commonwealth of the  
13    Philippines was established on November 15, 1935 as a  
14    preliminary step to its eventual absolute independence  
15    on July 4, 1946. With that consideration in mind, the  
16    United States and other sovereign powers have accorded  
17    the Philippine Commonwealth a semi-independent status  
18    almost similar to that enjoyed by a member of the British  
19    Commonwealth.

20           The Commonwealth of the Philippines was a  
21    member of the Pacific War Council, one of the original  
22    Allied Nations at war with Germany, Italy and Japan;  
23    was a member of the United States Relief and Rehabilita-  
24    tion Administration; was invited to attend the San  
25    Francisco Conference to draft the Charter of the United

1 Nations Organization; signed the Charter, and is now  
2 one of the charter members; and is a member of the Far  
3 Eastern Council. That, in my submission, refutes the  
4 suggestion that at any material date it was correct to  
5 describe the Commonwealth of the Philippines as a part  
6 of the United States of America in any higher sense  
7 than it would be correct to describe the Commonwealth  
8 of Australia as a part of the United Kingdom of Great  
9 Britain and Ireland. The Commonwealth of Australia is  
10 a part of the British Commonwealth of Nations, but it  
11 is not a part of the United Kingdom of Great Britain  
12 and Ireland. I might also add that in my submission  
13 it would not make the slightest difference as to the  
14 validity of the counts of the Indictment in which the  
15 Commonwealth of the Philippines is mentioned whatever  
16 might be its precise constitutional status with regard  
17 to the United States of America.

18           Mr. Yamaoka put forward a similar argument  
19 with regard to India although, in fact, there is no  
20 reference to India in the terms of the motion, and I  
21 would just like to deal with that. Again, the proof  
22 would have to be given, before the argument could be  
23 founded as a matter of evidence. But the actual facts  
24 with regard to India are as follows: India was a member of  
25 the Peace Conference in 1919 and an original signatory

1 to the Treaty of Versailles and to the Covenant of the  
2 League of Nations of which it was an original member;  
3 and Japan was a party with India to both of those docu-  
4 ments -- really one document -- both parts of that docu-  
5 ment. It had a separate government by the Government of  
6 India Act of 1919, and the Government of India Act of  
7 1935 extended the powers and improved the organization  
8 of that Government. It separately declared war on Japan  
9 in 1941. I mentioned it was always a separate member  
10 of the League of Nations. It is also a separate member  
11 of the United Nations Organization and of the Far East-  
12 ern Commission. There is, therefore, exactly the same  
13 warrant for including India as a country against whom  
14 Japan has committed a special offense and, as prosecutor,  
15 one of the nations nominating a member of this Tribunal.

16 I think that I have now covered the whole of  
17 the points raised in Mr. Yamaoka's argument, and I  
18 respectfully ask this Tribunal to dismiss the whole of  
19 that part of that motion as well as the two parts which  
20 were dealt with by Mr. Keenan and Judge Mansfield this  
21 morning.

22 JUDGE HSIANG: May it please the Tribunal, un-  
23 to now in this proceeding, our learned counsels on the  
24 defense have first tried to question the jurisdiction of  
25



1 this Tribunal and also challenge the Members thereof.  
2 Now they move for the Court's permission to dismiss  
3 practically every count in the Indictment. My associ-  
4 ates on the prosecution have answered them on various  
5 points. In addition to this, I would ask for the  
6 Court's permission to add a few observations of my  
7 own. This Tribunal was duly created by a general  
8 proclamation of the Supreme Commander for the Allied  
9 Powers in accordance with authority delegated to him  
10 by the Allied Powers, and, the Members thereof, having  
11 been designated by their respective governments con-  
12 cerned, were appointed by the Supreme Commander under  
13 the Charter under which we are functioning. I submit,  
14 we are not making new laws as charged by members of  
15 the defense to the contrary. The Charter simply em-  
16 bodies law and the principles already in existence.

17 Then, I would like to ask the permission of  
18 the Court to spend a few minutes on a few observations  
19 in answer to the motion brought about this morning  
20 with reference particularly to China, my country.  
21 The learned counsel for the defense say there was  
22 no war existing between China and Japan because Japan  
23 never declared war against China. Of course, it is a  
24 question as to what is the correct definition of war.  
25 But, since September 18, 1931, Japan took warlike



1 actions in China. killing thousands and thousands of  
2 people. soldiers as well as civilians. That was four-  
3 teen years ago. On July 7, 1937, Japan started a war  
4 at Marco Polo Bridge, killing hundreds in one night.  
5 Later, Japan sent her soldiers all over China killing  
6 millions and millions of soldiers as well as children,  
7 women, and helpless civilians -- noncombatants. I  
8 think those are facts known all over the world. If  
9 that were not war, what is a war -- what is a war, I  
10 wonder?

11 CAPTAIN KLEIMAN: May it please the Tribunal,  
12 I represent the defendant. HIRANUMA. On his behalf I  
13 request that, in the submission of arguments with re-  
14 spect to the jurisdiction of this Tribunal to try these  
15 defendants, or to the legality of the allegations in  
16 the Indictment under international law, evidence be  
17 not given or that prejudicial statements be not made,  
18 and I request that the prosecution confine themselves  
19 to facts which they can legally present in argument on  
20 a motion.

21 THE PRESIDENT: The facts must be judicially  
22 noticed, all those not in controversy; that direction  
23 has already been given. I have not noticed that Judge  
24 Hsiang has exceeded that direction.

25 JUDGE HSIANG: Since 1931 Japan sent her

1 soldiers all over China, all over the provinces, with-  
2 out any provocations on the part of China. I submit  
3 that there was a war, whether Japan declared war  
4 against China or not, although China did not declare  
5 war against Japan until December 9, 1941. But there  
6 was a war; that was my submission. I think the Court  
7 would take judicial notice to that effect.  
8

9 Then I think the Chinese people had all along  
10 most friendly feelings toward the Japanese people.  
11 But we submit to the Court that their leaders misled  
12 them, fooled them, and destroyed them -- ruined them,  
13 and those leaders ought to be held responsible as a  
14 matter of justice, not only to the oppressed among  
15 the Chinese people, not only in the interest of world  
16 peace, but also in the interest of the Japanese people.  
17 That is my submission.

18 Then, this morning, our learned counsel for  
19 the defense said that Japan has, all along, dealt with  
20 the duly constituted Government of China. I do not  
21 quite understand their meaning of the "duly constituted  
22 Government." Japan set up a puppet here and there: in  
23 Manchuria, in Eastern Hopeh, in Nanking, and in other  
24 places. Those puppet governments were controlled and  
25 directed by them. The Defense forget the duly con-  
stituted Government of China, dismissing very lightly

1 what was and is our legitimate government recognized  
2 all over the world, namely, our Central Government,  
3 our National Government under Generalissimo Chiang  
4 Kai-shek.

5 I also would like to make one remark about  
6 the Mongolian People's Republic, as it appeared in our  
7 Indictment, mentioned by our friend on the defense  
8 counsel.

9 The Indictment represents the composite views  
10 of eleven prosecuting nations. The independence of Mon-  
11 golia -- outer Mongolia -- was never recognized by China  
12 until last year. Because reference was made to these  
13 matters, I feel it is my duty to put on record that China  
14 did not recognize such a thing as the Mongolian People's  
15 Republic until sometime after conclusion of the Treaty  
16 of Amity and Alliance between the Republic of China and  
17 the Union of Soviet Socialist Republics on August 14, 1943.

18 After our war of resistance had existed for  
19 some time, Generalissimo Chiang Kai-shek made the state-  
20 ment that future historians will record the Chinese war  
21 of resistance as one of the most remarkable events  
22 happening in the world now. China, by resisting, is  
23 not only doing herself a service, but is at the same  
24 time doing a service to humanity by preserving peace.  
25 We Chinese people suffered without example --



1 THE PRESIDENT: Judge Hsiang, you are getting  
2 out of order. You are not arguing, but you are making  
3 an address on another matter entirely.

4 Please strike out of the record anything  
5 which is irrelevant and which has exceeded the limita-  
6 tions which we have already imposed.

7 JUDGE HSIANG: I submit that this Court, sit-  
8 ting as a Court of Justice, is competent to try crimi-  
9 nals who have committed crimes against peace, against  
10 conventions of war, against humanity. And Japan, by  
11 carrying on aggressive war in China -- their leaders  
12 are guilty of those crimes. We are here to prosecute  
13 them and, in due course, will submit evidence on those  
14 facts. And we are sure that the Court will pronounce  
15 sentence in due time on those acts.

16 I am through now.

17 THE PRESIDENT: Is there any reply from the  
18 defense?

19 MAJOR BLAKENEY: Mr. President, there will  
20 be a brief reply on behalf of the defense. I cannot  
21 say just how many minutes it will take; it won't be  
22 long.

23 THE PRESIDENT: Who is going to make it,  
24 you?

25 MAJOR BLAKENEY: I am to make it, sir.



1 THE PRESIDENT: Are you prepared to go  
2 ahead?

3 MAJOR BLAKENEY: I should like to have a  
4 recess of ten or fifteen minutes, if permitted.

5 THE PRESIDENT: We recess now for fifteen  
6 minutes.

7 (Whereupon, at 1535, a recess was  
8 taken until 1555, after which the proceedings  
9 were resumed as follows:)

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1 MARSHAL OF THE COURT: The Tribunal is now  
2 resumed.

3 DR. KIYOSE: Mr. President, I wish to be  
4 permitted to speak on the subject of interpreters.

5 THE PRESIDENT: I have already told you what  
6 has been done, what will be done, and what is being  
7 done. There is no need for me to repeat that.

8 DR. KIYOSE: What I wish to state is that we  
9 of the defense counsel would like to have interpreta-  
10 tions made as it was done yesterday. For instance,  
11 when the prosecutor representing the Republic of China  
12 spoke a short while ago, both defendants and their  
13 counsel were unable to understand and, for that reason,  
14 were unable to raise any objections. Captain Kleiman  
15 raised an objection; but, to the Japanese counsel, his  
16 statement was not understandable.

17 THE PRESIDENT: The objection raised by  
18 Captain Kleiman was upheld. I said we would strike out  
19 of the record everything that was irrelevant to the  
20 motion.

21 DR. KIYOSE: The ruling made by the Honorable  
22 Judge is highly satisfactory; but, good or bad, unless  
23 the proceedings are understood by both the defendants  
24 and their Japanese counsel, this cannot be considered  
25 a fair trial.

1 THE PRESIDENT: The necessary translations  
2 will be provided at the earliest possible moment. I  
3 can do no more than direct that. Now, that closes the  
4 matter.

5 Major Blakeney!

6 MAJOR BLAKENEY: By leave of the Tribunal, I  
7 have been requested by all American defense counsel  
8 who have argued on this motion to make a very brief re-  
9 buttal which we deem to be necessary to the several  
10 replies.

11 In these circumstances, I trust that the  
12 Tribunal will forgive me if I seem to dart with un-  
13 seemly rapidity from one point to another. The chief  
14 prosecutor, in offering to the Tribunal the assumption  
15 that all of the powers of the world, or substantially  
16 all of them, might come to be engaged on the side of  
17 the victors, was, I think, guilty of something of an  
18 overstatement. But, this is not quite the point --  
19 this question of whether there exist more or other  
20 neutral nations.

21 This is to confuse the question of power of  
22 the victor over the vanquished with the question of law  
23 which we are discussing on these motions. Whether a  
24 war be aggressive or defensive, the power of the victor  
25 is the same. We may be quite sure that if this trial

1 is conducted under the Indictment as it at present  
2 stands, after any future war there will be a trial; our  
3 own statesmen may be on the losing side--

4 THE PRESIDENT: That does not go to juris-  
5 diction; that goes to the consequences of exercising  
6 jurisdiction.

7 MAJOR BLAKENEY: I am coming to that.

8 Mr. Comyns Carr has discussed the distinction  
9 between lawful and unlawful wars by which, I take it,  
10 he may be considered to mean the distinction between  
11 the lawful and the unlawful side of the war.

12 On the specific question of the murder  
13 charges in the Indictment, I think the argument of  
14 the prosecution goes to this extent: that all killing  
15 on the victorious side is lawful, and all killing on  
16 the losing side is murderous.

17 It is just because of the absence of an  
18 objective viewpoint that the powers by The Hague  
19 Conventions, by the Geneva Protocol, have provided  
20 for the regulation of war without attempting this  
21 moral judgment. It is on this account that we find,  
22 I repeat, the authorities on international law saying,  
23 as says Oppenheim, page 175, that "the rules of  
24 international law apply to war from whatever cause  
25 it originates."



1           Turning to another point, we have been told  
2 in argument by several of the prosecution staff that  
3 the fact that Japan did not declare war is not sig-  
4 nificant. Of course, it is not significant. The  
5 significant fact is that China, say, did not declare  
6 war; and, if this is open to question, if it will still  
7 be contended that a state of war existed between China  
8 and Japan, we may refer not to the proof in the cause  
9 but to the authorities.

10           We may refer to "Hyde's International Law"  
11 heretofore mentioned, page 1687, which in the 1945  
12 edition makes the following statement on the authority  
13 of Senator Pitman, Chairman of the Senate Committee on  
14 Foreign Relations of the United States: "In the pend-  
15 ing conflict, both governments have denied that a state  
16 of war exists. At that time in 1937, and at numerous  
17 later times, the same denial of the existence of a  
18 state of war was made on both sides of the controversy."

19           I will not burden the Court with further  
20 reading. I have mentioned the book and the page, and  
21 I submit the authority. The members of the prosecution  
22 staff who have addressed the Tribunal seem in some  
23 measure of disagreement among themselves whether they  
24 are here attempting to set a precedent.

25           They have on the one hand conceded, as they

1 must, that this trial is without precedent in the his-  
2 tory of the world, and they have, on the other hand,  
3 stated their purpose to be not the making of new law  
4 but the enforcement of existing law.

5 The distinguished Associate Prosecutor from  
6 Australia agreed in almost these words that there is no  
7 declaration in any convention, treaty or pact of the  
8 criminality in international law of any specific act,  
9 no declaration of a principle of individual responsi-  
10 bility, and no declaration of a penalty to be imposed  
11 for violation of those conventions.

12 Thus it stands admitted that such theoret-  
13 ical statements of what the law should be, as, for  
14 example, Mr. Oppenheim's, have not supplanted those  
15 same authorities' statements, such as Mr. Oppenheim's,  
16 of what the law has been and is.

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1           The final line is then drawn between the law  
2 as it is and the law as the prosecution would wish that  
3 it were.

4           We are willing to submit to the verdict of  
5 this Court on this question rather than to that verdict  
6 of history which has been referred to but which I fear  
7 will very little avail these men in the dock. I am re-  
8 quested merely to cite an authority on one last matter.  
9 This is on the question of participation of the Philip-  
10 pines. India, and perhaps others, as an aggrieved party.  
11 I am quoting again from Oppenheim, page 196:

12           "According to the law of nations, full sovereign  
13 states alone possess the legal qualifications to become  
14 belligerents. Half and part sovereign states are not  
15 legally qualified to become belligerents."

16           With this we are ready to submit our argument.  
17 If the Court desires, we can submit briefs and citations  
18 of authorities; but, for our own part, we are content to  
19 rest it here.

20           THE PRESIDENT: For the time being, we will  
21 not require you to give any further assistance.

22           There is another motion standing in the paper.

23           MAJOR BLAKENEY: I beg your pardon, Mr. Presi-  
24 dent. I am advised what I did not know before, that one  
25



1 of Japanese counsel wishes to be introduced and make  
2 some remarks on this motion.

3 THE PRESIDENT: What is his name?

4 MAJOR BLAKENEY: Dr. TAKAHASHI.

5 THE PRESIDENT: He did not sign this motion.

6 MAJOR BLAKENEY: I am sorry. It seems to be a  
7 misunderstanding.

8 THE PRESIDENT: He may be interested in the  
9 next one.

10 MAJOR BLAKENEY: Yes, sir.

11 THE PRESIDENT: There is another motion stand-  
12 ing in the paper to be moved in behalf of ITAGAKI, KIMURA,  
13 MUTO and SATO. Is that to be argued by all four counsel,  
14 or is it decided that one shall put the argument for all?

15 CAPTAIN FURNESS: If the Commission please, I  
16 will make the argument for all four defendants. In other  
17 words, I speak in behalf of defendants ITAGAKI, KIMURA,  
18 MUTO and SATO.

19 I will read the points raised so that all  
20 Japanese counsel as well as American counsel will know  
21 what I am talking about.

22 The defendant MUTO, as a member of the armed  
23 forces of Japan, surrendered to the armed forces of the  
24 United States of America; and the defendants ITAGAKI,  
25 KIMURA and SATO, as members of the armed forces of Japan,



1 surrendered to the armed forces of the British Common-  
2 wealth of Nations. Upon such surrender, each of the  
3 said defendants became minister of war and remains in  
4 that status.

5 I wish to make a correction. I said "minister  
6 of war." I meant to say "prisoner of war."

7 No notice of this proceeding has been given the  
8 protecting power of Japan as required by Article 60 of  
9 the Geneva Convention. This Tribunal is not a Court  
10 authorized to impose sentence upon any of them as provid-  
11 ed in Article 63 of the Geneva Convention, and the proced-  
12 ure according to which they will be tried by this Tribunal,  
13 under its Charter and under its Rules of Procedure, is not  
14 the procedure "as in the case of persons belonging to the  
15 armed forces" of the power to which each of them respect-  
16 ively surrendered or by which they are now being detained  
17 as required by Article 63 of the Geneva Convention.

18 Those are the points raised, and I will now  
19 proceed with my argument.

20 Lieutenant General MUTO, as chief of staff under  
21 General YAMASHITA, surrendered on the 3d of September  
22 1946 with the rest of the 14th Area Army of the Japanese  
23 Imperial Forces. General ITAGAKI, as commanding general  
24 of the 7th Area Army, General KIMURA, as commanding general,  
25 Burma Area Army, and Lieutenant General SATO, commanding

1 the 27th Division of the Imperial Japanese Empire, sur-  
2 rendered to different elements of the British Common-  
3 wealth of Nations. All those members of the opposing  
4 army surrendered to armies in the field. None, at the  
5 time of his surrender, was charged or accused as a war  
6 criminal. They were all interned under Article 9 of  
7 the Geneva Convention, and there can be no question that  
8 at the time of their surrender they became prisoners of  
9 war under the protection of the clauses of that Conven-  
10 tion, dated 27 July 1929, relative to the treatment of  
11 prisoners of war.

12 It is our contention that since they have  
13 never been released, they remained in that status; that  
14 confining them separately as being suspected of war  
15 crimes, by charging or indicting them as war criminals,  
16 does not change their status, that as such prisoners of  
17 war they cannot be arraigned before this Tribunal be-  
18 cause certain conditions precedent have not been ful-  
19 filled before the commencement of this proceeding, and  
20 because under that Convention this Tribunal is not the  
21 type of Court which has jurisdiction to try them under  
22 the procedure set forth in its Charter or rules, nor to  
23 pass sentence upon them. We need not argue that the  
24 powers who are the accusers in this action and to whom  
25 these accused surrendered and who are purporting to try

1 them are bound by the Convention. The question is  
2 whether these provisions are applicable. We contend that  
3 they are.

4 Article 60 provides: "At the commencement of a  
5 judicial hearing against a prisoner of war, the detain-  
6 ing Power shall advise the representative of the protect-  
7 ing Power as soon as possible" and always before the date  
8 set for the opening of the trial.

9 This is a judicial proceeding. These men are  
10 to be tried for their lives, and their guilt or innocence  
11 is to be determined by you, as judges. It is not to be  
12 a mere administrative or political decision. The protect-  
13 ing Power of Japan is Switzerland, which has diplomatic  
14 representation here. Whether the arraignment is the  
15 commencement of the trial or not, it obviously would have  
16 been possible for that power to be notified sooner than  
17 this, and notice has not been given, or at least, not  
18 proven. Since this is a Court of limited jurisdiction,  
19 proof of jurisdiction must be shown on the face of the  
20 record.

21 Article 63 of the Convention provides, I quote:  
22 "A sentence shall only be pronounced on a prisoner of  
23 war by the same tribunals and in accordance with the same  
24 procedure as in the case of persons belonging to the armed  
25 forces of the detaining Power." If these men were to be



1    tried by the Court which would try persons in the armed  
2    forces of the nations that would capture them, they  
3    would not be before this Court but before a court-martial.

4            In the case of General MUTO, such Court would  
5    be composed of American Army officers. In the case of  
6    the other three officers, they would be composed of  
7    officers in the army and one of the nations comprising  
8    the British Commonwealth.

9            The procedure of such court-martial is very  
10   different from the procedure proscribed for and by this  
11   Tribunal.

12           In the case of General MUTO, Articles 25 and  
13   38 of the Articles of War would apply. Article 25 pro-  
14   hibits the use of depositions in capital cases by the  
15   prosecution, and Article 38 provides that courts-martial  
16   or military commissions shall apply rules of evidence  
17   generally recognized in the trials of criminal cases  
18   in the District Courts of the United States. Those rules  
19   would exclude most of the evidence which is permitted  
20   under Article 13 of the Charter. We contend that those  
21   provisions apply not only for trials for offenses commit-  
22   ted while a prisoner of war, but also to trials for  
23   violations of the laws of war committed while still a  
24   combatant. The Convention so adopted for the protection  
25   of the prisoner provided for a check by the protecting



1 power so that it might help in the choice of counsel if  
2 the accused had made no choice; that a representative of  
3 the protecting power should attend the trial and receive  
4 notice of sentence.

5           The provision that the Court and procedure  
6 shall be the same as that in trials of their own troops  
7 is reciprocal for the protection of the troops of each  
8 of the parties to the Convention, troops of the United  
9 States and the British Commonwealth, France, and Russia,  
10 as well as those of Japan.

11           It was, we contend, intended to deal with im-  
12 portant matters, not mere disciplinary actions or the  
13 judicial proceedings of the relatively trivial matters  
14 which might arise during a man's imprisonment. Those  
15 provisions refer broadly to judicial proceedings. They  
16 contain no restrictions. We contend the policies as  
17 well as language supports this view.

18           I quote from the dissenting opinion of Mr.  
19 Justice Rutledge in the YAMASHITA case and the decision  
20 of the Supreme Court:

21           "Such a construction is required for the  
22 security of our own soldiers taken prisoner, as much as  
23 for the prisoners we take. And the opposite one leaves  
24 prisoners of war open to any form of trial or punishment  
25 for offenses against the law of war their captors may

1 wish to use while safeguarding them, to the extent of  
2 the treaty limitations, in cases of disciplinary  
3 offense. This, in many instances, would be to make the  
4 treaty strain at a gnat and swallow the camel."

5         So before we say that these Japanese soldiers  
6 are not entitled to this protection, we must admit that  
7 our own soldiers would not be entitled to it. But, in  
8 signing the Convention, we agreed to that. I believe,  
9 if one of our men were on trial, we could contend these  
10 rules did apply. They were not mere procedural matters,  
11 not mere tactical rules of evidence, but fundamental  
12 rights.

13         We contend that these Japanese prisoners are  
14 entitled to such protection even though hostilities have  
15 ceased and there is direct communication with the  
16 Japanese government rather than through a protecting  
17 power. "To say otherwise," to quote again Justice  
18 Rutledge, "overlooks all the realities of the situation.  
19 Japan is a defeated power, having surrendered, if not  
20 unconditionally, then under the most severe conditions.  
21 Her territory is occupied by American military forces.  
22 She is scarcely in a position to bargain with us or to  
23 assert her rights. Nor can her nationals. She no longer  
24 holds American prisoners of war. Certainly, if there  
25 was the need of an independent neutral to protect her

1 nationals during the war, there is more now."

2           So we contend that both upon the language and  
3 reason these provisions of the Geneva Convention apply  
4 and, therefore, this Tribunal has no jurisdiction to try  
5 the four accused who surrendered as members of the  
6 Japanese armed forces.

7           THE PRESIDENT: Does the Prosecution care to  
8 reply?

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1 MR. COMYNS CARR: The first observation that  
2 I would like to make is that I notice with pleasure that  
3 this application is based upon the Geneva Convention of  
4 1929. At a later stage of the case it will be useful  
5 to us to know that the representatives of these  
6 defendants recognize that Convention.

7 LANGUAGE SECTION CHIEF: Will the court  
8 reporter on the rostrum please read the last statement.

9 (Whereupon, the official reporter  
10 read the last statement as directed.)

11 MR. COMYNS CARR: In my submission, however,  
12 the articles relied upon here have no application to  
13 the circumstances of this trial. The matter has been  
14 dealt with as the Tribunal has heard in the YAMASHITA  
15 case, and I should like to begin by reading the appro-  
16 priate passage from the judgment of the majority of the  
17 Supreme Court of the United States in that case. The  
18 late Chief Justice Stone delivering that judgment said:

19 "Petitioner further urges that, by virtue of  
20 Article 63 of the Geneva Convention of 1929, he is  
21 entitled to the benefits afforded by the 25th and 38th  
22 Articles of War to members of our own forces. Article  
23 63 provides: 'Sentence may be pronounced against a  
24 prisoner of war only by the same courts and according  
25 to the same procedure as in the case of persons belonging



1 to the armed forces of the detaining Power.' Since  
2 petitioner is a prisoner of war, and as the 25th and  
3 38th Articles of War apply to the trial of any person in  
4 our own armed forces, it is said that Article 63 re-  
5 quires them to be applied in the trial of petitioner.  
6 But we think examination of Article 63 in its setting  
7 in the Convention plainly shows that it refers to  
8 sentence 'pronounced against a prisoner of war' for  
9 an offense committed while a prisoner of war, and not  
10 for a violation of the law of war committed while a  
11 combatant."

12 At that point I will interpolate the remark  
13 that a fortiori it cannot apply to an offense against  
14 the law of nations committed before actual combat began  
15 or at the moment when it began.

16 LANGUAGE SECTION CHIEF: Will the court  
17 reporter read the last statement.

18 (Whereupon, the official reporter  
19 read the last statement as directed.)

20 MR. COMYNS CARR: In view of the difficulty  
21 that appears to be--

22 THE PRESIDENT: I think that expression "a  
23 fortiori" stumps him.

24 MR. COMYNS CARR: I am sorry, but I was going  
25 to submit to the Tribunal, in view of the difficulty

1 that appears to be arising, I would ask them to adhere  
2 to their previous ruling and allow me to complete my  
3 argument and have it translated as a whole at the end.  
4 I have not heard that the Court has altered that ruling,  
5 but for the time a contrary practice appears to have  
6 arisen again.

7 THE PRESIDENT: I understand my colleagues  
8 prefer the present system to continue. I do not know;  
9 I see no reason why you should not go ahead and finish  
10 your argument and let it be translated later as a whole.

11 MR. COMYNS CARR: Which, then, am I to do, sir?

12 THE PRESIDENT: Well, I will make a decision.  
13 Complete your argument, and we will have it translated  
14 later.

15 MR. COMYNS CARR: In that case, I will make  
16 another interpolation in reading the judgment, and that  
17 is this: that it is obvious from the terms of Article  
18 63 that the difficulties of applying it here are much  
19 greater than they would have been in YAMASHITA'S case.  
20 He was being tried by an American military commission,  
21 and he was being tried in Manila. It would have been  
22 possible to apply there the rules of procedure applicable  
23 to a member of the armed force of the detaining Power.  
24 Here we have a number of persons detained by different  
25 members of the Allied Powers, and we have a Tribunal

1 consisting of representatives of a number of different  
2 countries. It seems difficult to conceive that these  
3 proceedings could take place according to the procedure  
4 of any one of them rather than another, or that they  
5 could be broken up and dealt with in a number of  
6 different countries.

7 Proceeding with the judgment, I quote:

8 "Article 63 of the Convention appears in part  
9 3, entitled 'Judicial Suits,' of Chapter 3, 'Penalties  
10 Applicable to Prisoners of War,' of Section V, 'Prisoners'  
11 Relations with the Authorities,' one of the sections of  
12 Title III, 'Captivity.' All taken together relate only  
13 to the conduct and control of prisoners of war while in  
14 captivity as such. Chapter 1 of Section V, Article 42,  
15 deals with complaints of prisoners of war because of the  
16 condition of captivity. Chapter 2, Articles 43 and 44,  
17 relates to those of their number chosen by prisoners of  
18 war to represent them.

19 "Chapter 3 of Section V, Articles 45 through  
20 67, is entitled 'Penalties Applicable to Prisoners of  
21 War.' Part 1 of that chapter, Articles 45 through 53,  
22 indicate what acts of prisoners of war, committed while  
23 prisoners, shall be considered offenses, and defines to  
24 some extent the punishment which the detaining power may  
25 impose on account of such offenses. Punishment is of two



1 kinds -- 'disciplinary' and 'judicial,' the latter being  
2 the more severe. Article 52 requires that leniency be  
3 exercised in deciding whether an offense requires  
4 disciplinary or judicial punishment. Part 2 of Chapter 3  
5 is entitled 'Disciplinary Punishments,' and further  
6 defines the extent of such punishment, and the mode in  
7 which it may be imposed. Part 3, entitled 'Judicial  
8 Suits,' in which Article 63 is found, describes the  
9 procedure by which 'judicial' punishment may be imposed.  
10 The three parts of Chapter 3, taken together, are thus  
11 a comprehensive description of the substantive offenses  
12 which prisoners of war may commit during their imprison-  
13 ment, of the penalties which may be imposed on account  
14 of such offenses, and of the procedure by which guilt  
15 may be adjudged and sentence pronounced.

16 "We think it clear, from the context of these  
17 recited provisions, that part 3, and Article 63 which it  
18 contains, apply only to judicial proceedings directed  
19 against a prisoner of war for offenses committed while a  
20 prisoner of war. Section V gives no indication that  
21 this part was designed to deal with offenses other than  
22 those referred to in parts 1 and 2 of Chapter 3.

23 "We cannot say that the commission, in admitting  
24 evidence to which objection is now made, violated any  
25 Act of Congress, treaty or military command defining



1 the commission's authority \* \* \* \*

2 I think I am now getting to a part of it which  
3 is not necessary to read. But on the following page,  
4 he dealt with -- that is, the court dealt with, the  
5 other objection based on the Geneva Convention relating  
6 to Article 60.

7 "Article 60 of the Geneva Convention of July 27,  
8 1929, to which the United States and Japan were signa-  
9 tories, provides that 'At the opening of a judicial  
10 proceeding directed against a prisoner of war the de-  
11 taining power shall advise the representative of the  
12 protecting power thereof as soon as possible and always  
13 before the date set for the opening of the trial.'

14 Petitioner relies on the failure to give the prescribed  
15 notice to the protecting power to establish want of  
16 authority in the commission to proceed with the trial.

17 "For reasons already stated we conclude that  
18 Article 60 of the Geneva Convention, which appears in  
19 part 3, Chapter 3, Section V, Title III of the Geneva  
20 Convention, applies only to persons who are subjected  
21 to judicial proceedings for offenses committed while  
22 prisoners of war."

23 I would just like to supplement that judgment  
24 by saying that Mr. Justice Murphy, who delivered a dis-  
25 senting judgment, expressed in his judgment his

1 intention not to deal with this particular point, which  
2 he considered unnecessary. It is, however, right to  
3 say that at the conclusion of Mr. Justice Rutledge's  
4 dissenting judgment, which has been read to us by the  
5 learned counsel for these defendants, Mr. Justice Murphy  
6 did say that he concurred in Mr. Justice Rutledge's  
7 judgment. Whether that meant that he had changed his  
8 mind and was now concurring in the opinion relating to  
9 this particular point or not, I find it difficult to say.

10 THE PRESIDENT: Well, the general would hardly  
11 overrule the special.

12 MR. COMYNS CARR: Whether there was a dis-  
13 sension of one or two on this particular point is, I  
14 think, not clear.

15 But in my submission here again on this point,  
16 the ground in this case is immensely stronger even than  
17 it was in YAMASHITA'S case. Here we have a proceeding  
18 taking place in Japan where the Japanese Government,  
19 which the protecting power would otherwise represent, is  
20 actually on the spot. We have a proceeding notorious  
21 to the whole world, including both the present Japanese  
22 Government and the Swiss Government, and including also,  
23 of course, their representatives in Tokyo, a matter which  
24 will become still clearer when we come to give our  
25 evidence, although we did not think it right or necessary

1 to give them formal notice under this particular Article  
2 which, in our submission, has no application at all.

3 The purpose of having a protecting power under  
4 the Convention is that prisoners of war detained in a  
5 foreign and hostile land where their own government had  
6 no means of looking after them at all should have a  
7 protecting power capable of doing so. Those reasons  
8 have no application at all under the circumstances here.

9 My submission is, therefore, that this motion  
10 is entirely ill-founded, not only for the reasons given  
11 in the Supreme Court, by the majority in the Supreme  
12 Court, which could be very much amplified -- the more  
13 one studies the provisions of that part of the Geneva  
14 Convention to which they refer, and the more in detail  
15 one looks at them, the more manifest it is that their  
16 conclusion was inescapable -- but, furthermore, for the  
17 reason which was less applicable in that case than it is  
18 in this, that the circumstances in which this trial is  
19 held are so utterly different from those contemplated  
20 in the Geneva Convention that it would have been perfectly  
21 absurd for the prosecution, or they otherwise could  
22 have quite easily done so had they thought it proper,  
23 to have acted under this particular provision of the  
24 Geneva Convention and given formal notice to the protecting  
25 power which it would call for in a case such as was



1 really contemplated by the Convention, where a prisoner  
2 of war in a country and place where his own government  
3 could do nothing for him, was entitled to look upon  
4 the protecting power for its good offices.

5 Japan, as I have said at the beginning, or  
6 these defendants, are apparently recognizing the appli-  
7 cability of the Geneva Convention to the matters in  
8 question in this case. It will be interesting, when we  
9 come to the evidence, to see whether in the cases, for  
10 instance, of the American flyers charged with offenses  
11 before they came into the power of the Japanese author-  
12 ities, the Japanese government afforded the protecting  
13 power, under circumstances where it might have been help-  
14 ful, any opportunity of intervening in their behalf.

15 THE PRESIDENT: I do not suppose you wish to  
16 reply. You cannot improve on Mr. Justice Rutledge's  
17 language, Captain.

18 CAPTAIN FURNESS: No. I do want to stress the  
19 fact that the United States Supreme Court, while its  
20 decision is entitled to great weight with this Court --

21 THE PRESIDENT: We fully realize we are not  
22 bound by it.

23 CAPTAIN FURNESS: Then, I shall just ask you  
24 to read Section V of Mr. Justice Rutledge's opinion which  
25 states the case for these defendants.



1           As to recognizing the Geneva Convention, we  
2           are arguing it for the purposes of this motion. What  
3           the later connotations, or what the prosecution has with  
4           regard to it later on we will deal with when the time  
5           comes. I do not want, by arguing this motion, to admit  
6           that it is applicable in all cases which the prosecution  
7           says it is.

8           THE PRESIDENT: The last motion contained in  
9           the paper is that for further particulars. We will take  
10          that tomorrow morning, and we hope that the application  
11          will be pressed by one counsel and not by four or five.

12          MR. COMYNS CARR: We were intending to submit,  
13          Your Honor, that matter is more properly to be dealt with  
14          in Chambers than in a public sitting; not that we have  
15          any objection to dealing with it in a public sitting,  
16          but it is a kind of matter more commonly dealt with in  
17          chambers and not likely to be of public interest.

18          THE PRESIDENT: That was my first impression,  
19          Mr. Comyns Carr. But, this being a criminal matter, and  
20          it being necessary, I think for the whole of the Court to  
21          deal with it, this Court is the only convenient place.

22          The Court reserves its decision on the matter  
23          last heard.

24          CAPTAIN FURNESS: If it please the Tribunal,  
25          one of the Japanese counsel would like to address the

1 Court in connection with the motions on jurisdiction or  
2 matters closely related to them. Shall that matter wait  
3 until tomorrow, as well, or shall he address the Court now?

4 THE PRESIDENT: No, no. He is not a party to  
5 it. We will confine the arguments to the parties to  
6 these motions. In other words, we might have to hear  
7 twenty-eight counsel or twenty-six, whatever the number  
8 is.

9 CAPTAIN FURNESS: He also represents the accused  
10 SHIGEMITSU who is a party to the motion.

11 THE PRESIDENT: This matter will get out of  
12 hand if we grant applications of that kind. As I said,  
13 the motion last heard will be considered. We reserve  
14 our decision which will be given at a later date.

15 The motion for further particulars will be  
16 taken tomorrow morning at half-past nine.

17 Might I inquire whether one counsel or more will  
18 make the application for further particulars?

19 CAPTAIN FURNESS: One counsel, sir: Captain  
20 Klieman.

21 THE PRESIDENT: The Court will adjourn until  
22 thirty past nine o'clock tomorrow morning.

23 (Whereupon, at 1715, an adjournment  
24 was taken until Wednesday, 15 May 1946, at 0930.)

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